Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable And Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant To Section 706 of the Telecommunications Act of 1996	)	GN Docket No. 04-54

COMMENTS OF
THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS
AND THE ALLIANCE FOR COMMUNITY MEDIA

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May 10, 2004

SUMMARY

Local governments welcome broadband deployment to their communities. Local governments recognize that the economic prosperity of their local economies is linked to the deployment of broadband. Local governments recognize the importance of broadband to the businesses within their communities, and the ability it has to improve the quality of life of their citizens, through applications such as, telemedicine, teleworking, and the delivery of entertainment services.

Local government is best viewed as a facilitator in bringing advanced telecommunications services to their communities. This role of facilitator often requires innovative solutions, where the competitive market fails. Local governments are best equipped to develop solutions that are best suited to their community and its broadband needs.

While local government welcomes broadband deployment in their communities, local governments cannot ignore its responsibility as a steward of the public rights-of-way. The public expects local government to manage this public right-of-way in a safe and efficient manner allowing for the deployment of new innovative services and additional providers, while protecting existing users and services. We also note that the public rights-of-way is a scarce and valuable resource and local governments as a trustee of this public resource may require just compensation for use of this resource as appropriate.

Local governments' management of the public rights-of-way should not be viewed as an impediment of timely broadband deployment. There are no barriers that prevent broadband providers from deploying in communities throughout this country. Decisions on where and when to deploy are based on the business considerations of the broadband provider. It is often these decisions by providers that require innovative solutions by local government.

Local government has a legitimate interest in making sure that broadband is deployed in a timely manner, as their communities depend on this deployment. We have worked with various organizations on rights-of-way issues and believe that these discussions are useful in fostering both a better understanding and coordination amongst various interests. We also believe there is much to gain from these past endeavors, such as the body of work produced by the Commission's Local and State Government Advisory Committee.

We believe the role of both the federal government and states should be limited with respect to management of the rights-of-way as local government is best suited for this responsibility. While the federal government has rights-of-way management authority over lands within federal jurisdiction, the authority over the management of public rights-of-way within the local jurisdiction has been limited by Congress. And where it is within the authority of states to adopt rules and regulations concerning the administration of the public rights-of-way, state-wide policies come at a cost, as they can

limit the solutions that local governments use to ensure broadband is deployed in their communities.

We welcome the FCC's interest in rights-of-way management, but caution against the Commission taking actions that exceed the scope of its authority as granted by Congress. While disputes between managers of the rights-of-way and industry regarding the management of or compensation for public rights-of-way will inevitably occur, these disputes are under the exclusive jurisdiction of the courts.

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I. Introduction

The National Association of Telecommunication Officers and Advisors (NATOA) is a national association that represents local governments and those who advise local governments on telecommunications issues. The membership is predominately composed of local government staff and public officials, as well as consultants, attorneys, and engineers, who consult local governments on their telecommunications needs. The Alliance for Community Media (ACM) is a national nonprofit membership organization that educates and advocates on behalf of Public, Educational and Government (PEG) access. Since 1976, the Alliance has been "Building Community Through Media."

While appreciating the breadth and scope of the issues to be addressed by the Commission in this proceeding, NATOA and ACM specifically respond to concerns raised in paragraphs 38 through 40 of this Notice of Inquiry (NOI) regarding rights-of-way management and its potential impact on the deployment of broadband services. As principal managers of the public rights-of-way, local government can add an important perspective to this record and welcomes the Commission's interest on these issues. However, being interested, and compiling and disseminating helpful information, is much different than having legal authority to dictate an outcome, and to preempt traditional state and local police power authority. As described in these comments, the Commission must continue to recognize that its legal authority to direct local government's actions is limited by federal law.

II. Local Governments Support the Deployment of Broadband Services

Local government is often cast in a negative light by telecommunications providers as barriers to deployment of advanced services, and through the questions presented in this NOI, we are concerned that the Commission not blindly accept this premise. The industry perspective would ignore the fact that local governments across this country have an inherent interest in ensuring that their constituencies receive advanced telecommunication services. While the economic benefits of the widespread deployment of broadband services to the United States as a whole have been estimated at $500 billion or more annually[1], these benefits will grow from communities throughout the nation that are best able to participate in this new economy. The deployment of broadband has real economic and quality of life benefits for communities.

There is no question that the deployment of broadband brings economic benefits to businesses throughout this country. Broadband helps minimize the limitations of physical distance, and brings with it increased productivity and new business opportunities. Local economies are directly linked to the success of businesses within their communities. The need for a robust broadband network is an important element for attracting new business and keeping existing businesses.

[1] Robert W. Crandall and Charles L. Jackson. "The $500 Billion Opportunity: The Potential Economic Benefit of Widespread Diffusion of Broadband Internet Access," Criterion Economics, L.L.C., Washington, DC, July 2001

A robust broadband network is increasingly seen as an important element of a livable community. Local governments recognize that broadband has the ability to improve the quality of life of their citizens. In urban communities, broadband can alleviate traffic jams through teleworking; and in rural communities, individuals have access to better health care through telemedicine. A robust broadband deployment can also increase distance learning opportunities, be used to promote public safety, deliver entertainment services and create a closer bond between local governments and their constituencies. Recognizing the importance of broadband, a number of local governments have even begun to implement wi-fi networks to provide ubiquitous broadband connectivity within their communities.

In addition, as traditional telephony and video programming services migrate to the Internet, the ability to have multiple broadband providers will be essential to a highly competitive converged voice, video and data marketplace. Local governments welcome a truly competitive broadband marketplace, and the choice, quality and cost saving that a competitive market will provide their citizens.

A. Local Governments Are Best Viewed As Facilitators Of Advanced Telecommunications Services.

We are concerned that paragraph 38 of the NOI might suggest that the Commission is predisposed to a conclusion that local governments stand as a barrier to advanced telecommunications services. It is in the best interest of local governments to act as a facilitator. On multiple occasions, local government participants in Commission proceedings have provided information to the Commission and its staff indicating that individual rights-of-way problems between industry and local government are few and far between. We note that the Commission's own NOI in this proceeding points to only three complaints noticed by the Commission relating to rights-of-way disputes. We have urged the Commission not to make national policy on any issue impacting local governments based upon a small number complaints or anecdotal examples that may or may not be true.

Paragraph 40 of the NOI seeks comment on practices used by local governments to encourage broadband deployment. Local governments have traditionally worked to bring about the deployment of advanced telecommunications capabilities. NATOA has prepared a draft report *Making Sure No Citizen is Left Behind: A Report on How Local Government is Promoting the Availability of Advance Telecommunications Services to All Consumers.* This report, attached as Exhibit 1, highlights many instances throughout the country where local governments have promoted the deployment of advanced services to their constituents through either negotiations with service providers, purchase of services, or direct provision of such services. The report is entitled "Draft" for the purpose of permitting updates to the document as time and resources permit.

In an attempt to create greater efficiencies in the management of rights-of-way to the mutual benefit of their constituencies and telecommunication providers, many local governments have focused extensively on creating effective policies tailored for their communities. The attached report provides a number of examples which serve to illustrate how local government has worked to promote broadband deployment and the availability of advanced services within their communities. This report evidences the unique approach that each local government brings to the equation. It is for this reason that we do not support a "one size fits all" approach to rights-of-way management, given the diversity of communities throughout this country.

Local governments have worked diligently to embrace the principles of the Telecommunications Act of 1996 in their rights-of-way management policies and the best evidence of this effort is best demonstrated by the limited number of filings at the FCC regarding right-of-way management issues.

B. Local Governments Have Used Innovative Solutions To Achieve Deployment Of Advanced Telecommunications Capabilities To Their Constituents.

As described above, local government can best be viewed as a facilitator in bringing advanced telecommunications services to their citizens. In this role as facilitator many local governments have found innovative solutions to bring broadband to the community. Examples of these innovative solutions include:

> New York, New York, On February 9, 2004, the City issued a request for proposals for franchises for the deployment of mobile communications equipment on city-owned light poles, traffic light poles and highway sign support poles for the delivery of mobile telecommunication services to residents, visitors and businesses. In this request the City also specifies that the design of these attachments be consistent with the public interest goals of a safe and aesthetic streetscape.[3]
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> Lynchburg, Virginia, built and sold a 42-mile fiber-optic network to CFW Communications (now nTtelos) for $1 and in return received: 1) 30 year irrevocable right to use all fibers it had previously been using; 2) Eight fibers on all new routes in the City; 3) the Operator's guarantee to offer broadband services to 95% of address in the City within four years; 4) and the best telephone rates in Virginia for 10 years.
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> Dubuque, Iowa, which has a population of 59,000, paved the way for wireless broadband service. Given the geographic location of the city, which rest below wooded limestone bluffs of the Mississippi River, there were challenges to the propagation of wireless radio and television signals. The City recognized the importance of balancing the need for competitive wireless telecommunications services with order, efficiency and sensitivity in the placing of new towers and

[3] The complete text of the City's Request for Proposals is available on the City's Web page at http://www.nyc.gov/html/doitt/downloads/pdf/poletop_rfp_2004.pdf.

antennas. After an independent analyses and public hearings the City identified City-owned properties as potential tower and antenna sites. Combined with an expedited permitting process, the City's objective has been to offer incentives for location of antenna facilities on existing structures, and for maximum collocation of facilities on a single structure. The plan is working very well[4], and has brought favorable comment from various cellular/PCS carriers.

C. Local Governments Have Created Their Own Networks Where the Private Sector Has Failed to Respond.

There are countless examples across the country where individual communities are not waiting for broadband service providers to deploy their network based on the service provider's schedule, or where municipalities are looking for greater capability than legacy networks provide. Some communities have been ignored completely, such as Scottsburg, Indiana (population 6000) where it was indicated to the town that "there were not enough resident to make it worth Verizon's trouble."[5] Scottsburg subsequently created it own municipal wireless broadband network. There are many similar examples of municipalities that are pro-actively creating broadband networks:

Tacoma, Washington in 1997 became one of the first municipalities to provide broadband service through it municipal owned power utility. The city spent over $100 million to deploy over 700 miles of coaxial cable and fiber to provide cable and data services to both businesses and residential customers. This broadband network has contributed to the economic prosperity of Tacoma, as in 2003 it was ranked the number 5 mid-sized city to do business in, by *Entrepreneur Magazine*.[6] The city boasts that it is "America's #1 Wired City."

Ashland, Oregon, is a community of 20,000 located 14 miles north of California on I-5 and home to Southern Oregon University and the Oregon Shakespeare Festival. The City operates its own municipal electric communications utility. The City began providing communications services when the incumbent ILEC refused to provide DSL and cable complaints grew too loud. Today, the City provides high-speed data and cable television services to business and residents.

Harlan, Iowa, is located in western Iowa and has a population of approximately 5,200 people. Due to the lack of advanced services from the incumbent providers, in May 1995, 71% of the voters approved the establishment of a telecommunication utility. In 1996, this utility built its own hybrid fiber and coaxial cable network, which consists of 9.3 miles of 60-strand fiber optic cable and 34 miles of coaxial cable.

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[4] Overall, six cellular/PCS service providers and one wireless Internet Service Provider now operate throughout Dubuque, and 24 new sites have been constructed within the City limits with a net gain of only 3 towers.

[5] Scottsburg, Indiana Wireless Network Saves the Community, http://www.muniwireless.com/archives/00315.html

[6] http://www.ci.tacoma.wa.us/econdev/

U.T.O.P.I.A. or the Utah Telecommunication Open Infrastructure Agency is an example of one of the most ambitious municipal based projects to deploy fiber to both homes and businesses. UTOPIA, which is a political subdivision of the Sate of Utah, was formed by 17 Utah municipalities to determine if feasible and then construct a high-speed network. Recently this project has suffered a set-back with one of the largest members, Salt Lake City, having voted not to provide financial support to this project. That decision was made, in part, after lobbying by the ILEC with a Qwest executive indicating that "We're prepared to make a substantial investment in Salt Lake City."[7] It has been reported that Qwest "offered to extend its digital subscriber lines to 90 percent of the city's businesses and residents within the year if the council rebuffs UTOPIA."[8]

These serve as just a few of many examples where municipalities have worked to bring broadband services to their communities, where providers have failed to address local governments' goals in the deployment of broadband. The ability of municipalities to take responsibility for the future of their communities through broadband deployment is very important. It is not the place of broadband providers to select which towns and cities are best able to participate in our country's evolving high-technology economy.

III. Local Governments Must Strike An Important Balance In Management Of The Public Rights-Of-Way.

Regulations governing the use of public rights-of-way are necessary to fulfill the responsibility of local governments as a steward of the public rights-of-way. The efficient and careful management of the public rights-of-way allows for the timely deployment of broadband services, while at the same time protecting existing infrastructure, such as the facilities of water, sewer, gas, electrical and other telecommunications providers. Local government is rightfully at the nexus of their citizens' needs and the industry's desires, and must balance these interests accordingly. Regulations and careful consideration of permitting requests help to protect the existing users of the rights-of-way and services that citizens rely on everyday. Even with careful management accidents do occur.

A quick search over the Internet evidences a variety of disruptions that occur through accidental cuts to telecommunications lines. For example, on May 6, 2004 thousands of customers in South Carolina lost service as a result of a cut to both a copper and a fiber-optic lines owned by Verizon[9]; on April 26, 2004 a fiber optic line owned by SBC affected thousands of customers of both dial-up and DSL services across the states of New Jersey and Connecticut[10]; on April 13, 2004 a fiber-optic line owned by SBC but

[7] Qwest makes offer if SLC sinks UTOPIA, The Salt Lake Tribune, Bob Mims, April 08, 2004, www.sltrib.com/2004/Apr/04082004/business/155108.asp

[8] No on UTOPIA looms in SLC, The Salt Lake Tribune, Bob Mims, April 13, 2004, www.sltrib.com/2004/Apr/04132004/utah/utah.asp

[9] http://www.thecarolinachannel.com/news/3276803/detail.html, (last visited on May 10, 2004).

[10] http://www.newsday.com/news/local/wire/ny-bc-ct-brf--internetoutag0426apr26,0,1800781.story?coll=ny-ap-regional-wire, (last visited on May 10, 2004).

used by Verizon disrupted service to thousands in Champaign County, Illinois[11]. These are but a few examples of the minor disruptions that occur throughout the country. Rights-of-way accidents have a cost in dollars and unfortunately sometimes in lives. Two examples from recent years include:

> St. Cloud, Minnesota, Mayor Larry Meyer declared Saturday, December 11, 1999, a day of remembrance for citizens of his community killed when a natural gas pipeline was struck by subcontractors digging to install cable lines. Four people were killed, more than a dozen injured in the explosion with property damage in excess of $1,000,000.
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> Dallas, Texas, on Labor Day 2000, contractors installing fiber-optic cable in downtown Dallas struck a water main. As a result of the damage, water gushed into the streets and poured into a parking garage below a luxury building, practically destroying two full levels of cars, in addition to other damage. The damage in total was estimated at over $4.5 million.

It is also important to recognize that the public rights-of-way are a valuable and limited resource held in trust for the public by local government. As a limited resource the public rights-of-way used to be analogous to that of radio spectrum. In 1993, under the *Omnibus Budget Reconciliation Act of 1993*, Congress allowed for competitive bidding or auctions for radio spectrum. This policy allowed radio spectrum a limited resource owned by the American public, and held in trust by the federal government, to be leased by the FCC to the highest bidder with the proceeds from these auctions directed to the U.S. Treasury. As the FCC has recognized however, creative use of spectrum in recent years is making it more of a renewable resource, rather than a limited resource. As was stated in a recent speech by FCC Chief John Muleta, "new technologies such as cognitive radios, software radios, and just the raw increase of processing power dedicated to digital signal processing is making spectrum a more fungible commodity." Mr. Muleta continued to discuss the opportunities this new vision of spectrum permits, while noting that "It is only when licensees realize the true economic value of the spectrum resource will they focus on innovation and growing markets."[12]

Unlike spectrum, where modulation alone can increase opportunities, rights-of-way are finite. While technology may permit more being placed in less space, as with spectrum, it still remains true that there is a sum total available to all users. And, as with spectrum sold to the highest bidder, there is a very real market value assignable to access to the public rights-of-way. It is public property that is being used for private gain. Requiring local government to provide telecommunications companies' access to the public rights-of-way at direct cost, given that it is a limited resource, creates special treatment rules for this single industry, and provides a public subsidy to

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[11] http://www.news-gazette.com/story.cfm?Number=15808, last visited on May 10, 2004.

[12] "The Changing Nature of Spectrum Regulation and Its Impact on Broadband Wireless," Presented by John B. Muleta, February 24, 2004, Broadband Wireless World Conference, San Diego, California, http://wireless.fcc.gov/statements/022404WirelessBroadbandShow.doc

telecommunications providers. In addition, this choice to publicly subsidize the telecommunications industry should not and cannot be made at the federal level as Congress wisely saw fit to allow state and local government to make these determinations, under Section 253 of the Communications Act.

IV. Securing Access to Rights-of-Way is not an Impediment to Timely Broadband Deployment.

In paragraph 38 of the NOI the Commission notes the concern expressed in the *Third Report* pertaining to "the difficulty some companies have faced in securing access to the rights-of-way." However, industry claims of a widespread, national difficulty of securing access to rights-of-way (or even limited, local problems causing major connectivity problems in broader based networks) as an impediment to a timely deployment of broadband infrastructure are without merit. Footnote 52 of the NOI, while lengthy, lists only three complaints filed with the Commission in the past four years.

The timely deployment of broadband infrastructure is based on business considerations, such as investment capital and the profit margins of broadband providers, as rightfully required by their fiduciary responsibility to their shareholders. While local regulations necessary to manage the rights-of-way may be considered by business to be an unnecessary constraint, the decisions on where and when to deploy infrastructure would still take place even if there were no regulations at all, and would still be weighed against other business opportunities.

It is also important to note that broadband over cable is available to 85% of all U.S. households according to National Cable and Telecommunications Association (NCTA)[14], this build out occurred under and through regulation at the local level. Cable broadband accounts for over 58% of all high speed access lines according to the Commission's June 2003 data.[15] Through local government franchise requirements that the entire franchise areas be upgraded, the build out of high speed cable service was more widespread, and stands in stark contrast to DSL services where telecommunications providers had the ability to pick and choose the areas in which to deploy DSL service.

It is no secret that the telecommunications industry would prefer to have the deployment of advanced telecommunications services subsidized through minimal cost and regulation over access to public rights-of-way. However, local government has a fiduciary responsibility to its citizenry to ensure that they receive compensation for private use of the public's property. It is also clear that good management and control, including regulatory oversight, can enhance the reliability of, and timely deployment of, advanced telecommunications services throughout the nation.

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[14] http://www.ncta.com/Docs/PageContent.cfm?pageID=37

[15] *High-Speed Services For Internet Access: Status as of June 30, 2003*, Federal Communication Commission's Industry Analysis and Technology Division, Wireline Competition Bureau, December 2003

V. Local Governments Have Welcomed Opportunities To Share Information With The Commission On Right-Of-Way Issues.

As the NOI notes in paragraph 38, on October 16, 2002 the Commission held a Rights-of-Way Forum. The information discussed at that Forum was consistent with many similar discussions between local and state officials, and industry representatives. The key points addressed at the Forum indicated that:

> 1) the examples of local government and industry cooperation are far more evident than the problems;
>
> 2) the concerns about access to rights-of-way and the management issues faced by local governments have many general similarities, but can also be as unique and diverse as the nations' local governments themselves – thereby precluding a set of boilerplate regulations that would work everywhere;
>
> 3) the best way to address the more limited number of individual problems affecting access to the rights-of-way and its impact on broadband rollout is by mutual education and discussion between the affected parties, and allowing for judicial intervention when and where appropriate.

We would encourage the staff reviewing comments in this proceeding to refresh their recollection of the presentations made at that forum.

VI. Local Governments Regularly Cooperate with Other Entities on Rights-Of-Way Issues.

While the Commission makes mention of various organizations with whom it has had interaction on the issue of rights-of-way, including NARUC and NTIA, it does not mention the one national association whose members are primarily responsible for the management and control of rights of way. The American Public Works Association, APWA, has done extensive work on the issue of rights-of-way, and is a premiere resource for all levels of government. APWA maintains a website of resources which we would recommend to Commission staff as they use this opportunity to enhance their knowledge in this area.[16]

NATOA would also like to point out that in direct response to requests of the Local and State Government Advisory Committee to the FCC and the needs of our members, NATOA, the National League of Cities, the United States Conference of Mayors, the International Municipal Lawyers Association and the National Association of Counties produced a document titled *A Local Officials Guide to Telecommunications and Rights of Way*. That publication was distributed widely to the members of our respective organizations for use by our elected officials in their consideration of issues

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16 http://www.apwa.net/ResourceCenter/index.asp?Section=row&SectionName=Right+of+Way+Management

pertaining to access to public rights-of-way by telecommunications providers.[17] NATOA has also produced several issues of its *Journal of Municipal Telecommunications Policy* devoted to the issues of telecommunications access to public rights-of-way. These publications help to educate and inform local governments on all aspects of their roles as stewards of the public rights-of-way.

Paragraph 39 of the NOI makes reference to the work of The National Association of Regulatory and Utility Commissioners (NARUC) with specific emphasis on the product of one subcommittee working group. We wish to ensure that the Commission staff is fully informed as to the nature of that work, and to ensure that the outcome of the study is not mischaracterized. NARUC spent significant time in the past few years working on rights-of-way issues, but has ***not*** developed a consensus. Despite the inference in this NOI to the contrary, the NARUC report on rights-of-way management, "Promoting Broadband Access Through Public Rights-of-Way and Public Lands," prepared by the NARUC's Study Committee on the Public Rights-of-Way was never adopted by NARUC's leadership. On July 31, 2002, NARUC's Board of Directors adopted a resolution stating the Board "offers its thanks to the Study Committee and all those that have submitted ideas and participated in the Rights-of-Way project and without endorsing the report recommends that regulators, academia, units of government and all industry sectors carefully review the report of the Study Committee on Public Rights-of-Way."[18] In fact, the report carries the following disclaimer "The options listed within this report are the product of the Study Committee on Public Rights-of-Way and do not necessarily reflect the views of NARUC."[19] Finally, one NARUC Commissioner made known her displeasure with the manner in which the study was presented, by issuing a written dissent to the vote taken on the resolution.[20]

While attempting to work with and through the Study Committee hosted by NARUC, local government found the process to be industry driven and lacking in balance. In a letter to Chair of the Board and President of NARUC and the Chair of the Committee on Telecommunications for NARUC, local government associations, including NATOA, the National League of Cities, the US Conference of Mayors and the National Association of Counties, were highly critical of the process and product of this study committee. The letter states that "the Study Committee has failed to fully assess the problems relating to broadband deployment, but rather has simply relied on concepts

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[17] The title page and table of contents of this publication have been included as Exhibit 2. Hard copies of the publication are available through either the National League of Cities or NATOA.

[18] Resolution on Recommendations For Promoting Broadband Facility Access to Public Rights-of-Way and Public Lands, Adopted by the NARUC Board of Directors July 31, 2002. http://www.naruc.org/associations/1773/files/broadband_access.pdf (last visited May 10, 2004).

[19] Promoting Broadband Access Through Public Rights-of-Way and Public Lands, 2002 NARUC Summer Meetings in Portland, Oregon (rel. July 31, 2002) at i. http://www.naruc.org/goto.cfm?returnto=displayindustrynews.cfm&industrytopicnbr=380&page=http://www.naruc.org/associations/1773/files/row_summer02.pdf (last visited May 10, 2004).

[20] *See* Dissent of Commissioner Loretta Lynch, attached as Exhibit 3.

to propose a piece of model legislation largely based on the Michigan legislation (while borrowing some pieces from other states)."[21]

At the same time that NARUC was engaged in the review of rights-of-way issues, the National Telecommunications and Information Administrations (NTIA) commenced a similar inquiry with respect to issues pertaining to access to both public rights-of-way and with respect to federal lands. NTIA's work on public rights-of-way issues is welcome although somewhat limited. NTIA has created a useful website, www.ntia.doc.gov/ntiahome/staterow/statelocalrow.html that provides a survey of rights-of-way practices in all 50 states, and the website shares examples of right-of-way management models. However, NTIA does not have a significant record on domestic rights-of-way issues. In fact, as far as we are able to determine, one question in a Notice on a *Request for Comments on Deployment of Broadband Networks and Advanced Telecommunications*, published in the Federal Register on November 16, 2001,[22] represents the totality of NTIA public inquiry into this issue. In addition, having examined the record made available online of this proceeding,[23] less than a third of the commenters out of nearly 100 even specifically mention "right-of-way," and these respondents are overwhelming represented by telecommunications providers. NATOA did submit comment on that proceeding, which we have attached hereto as Exhibit 5.

After the NOI refers readers to information that has already been compiled by NARUC and NTIA, the Commission notes that it will receive guidance from the Intergovernmental Advisory Committee, which was formerly the Commission's Local and State Government Advisory Committee (LSGAC). We are pleased that the Commission will look for guidance and expertise from these experts in rights-of-way management, and will keep local governments involved in the Commission's decision making process through this Committee. However, we strongly urge the Commission not to ignore the guidance, advice, and information it has previously been provided by the LSGAC – none of which was referenced in the NOI.

From its inception in 1997 through its conclusion in 2003, the LSGAC issued thirty-one Advisory Recommendations to the Commission. Four of those Advisory Recommendations directly or indirectly addressed issued related to management of the rights-of-way. LSGAC Advisory Recommendations numbers 1, 23, 24, and 31 are collectively attached hereto as Exhibit 6.

Moreover, the Commission did not note in the NOI, but should recall that a portion of the LSGAC meeting of January 25, 2002, was dedicated to providing the Commission and its staff a detailed presentation on rights-of-way issues. That presentation included detailed information on the direct and indirect costs of acquiring

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[21] Letter to Mr. William M. Nugent and Ms. Joan H. Smith from NATOA, National League of Cities, The U.S. Conference of Mayors, and National Association of Counties dated July 24, 2002, attached as Exhibit 4.

[22] Notice, Request for Comments on Deployment of Broadband Networks and Advanced Telecommunications, Docket No. 011109273-1273-01, Department of Commerce, National Telecommunications and Information Administration

[23] http://www.ntia.doc.gov/ntiahome/broadband/

and managing rights-of-way, the wide variety of public works-related issues that are addressed in rights-of-way management, fair market value issue relating to rights-of-way, case studies and evidence of the fact that anecdotal examples of 'bad actors' are not having a national impact on broadband deployment. The materials presented to the Commission at that meeting should be reviewed by staff working on this NOI proceeding, as they may not have had ready access to this material previously. The materials provided to the Commission at the January 2002 LSGAC meeting are attached as Exhibit 7.

The Commission should also be aware of the LSGAC's work with the Industry Rights of Way Working Group (IROW) from approximately May, 2002 through May, 2003. The intent of those meetings was to determine whether LSGAC could reach consensus with industry representatives on principals related to rights-of-way management. The parties initially agreed not to discuss the more difficult issues of compensation and a required time for local action on permit requests, and to attempt to build consensus and trust on the more basic issues of recognizing and defining the scope of local police powers with respect to entry into and work in the rights-of-way.

While this experience did not yield a comprehensive consensus document, it was nonetheless helpful in identifying the difficulties inherent in attempting to come up with a national, boilerplate set of principles. From the local government perspective, it was fascinating to observe the inability of a number of the industry representatives to agree on principles basic to local governments, such as the inherent local authority to require bonds and agreements to indemnify and hold harmless from companies that are excavating in local streets. At various points in the LSGAC – IROW discussions, representatives of certain major telecommunications companies attempted to convince LSGAC that local governments should not have the ability to require insurance and construction bonds from them because they were "large" companies. The fact that two of those companies were, at the time, in bankruptcy (Global Crossing and Worldcom), and another was the subject of multiple governmental investigations (Qwest), was lost on the industry advocates seeking to restrict traditional local police power.

The LSGAC – IROW discussions did result in a brief, general consensus document that addressed a few big picture issues, and never approached the detail needed to provide real direction. A number of IROW representatives would not accept the validity of the local government argument that public health and safety regulations relating to rights-of-way access imposed upon other utilities (including municipal utilities) should also apply to entities that provide broadband services. The dialogue was helpful, and provided a forum for each side to better understand the other. However, from a local government perspective, there seemed to be no ability to obtain a broad based consensus from industry on the basic, foundational rights-of-way management authority of local governments. Instead, the emphasis by some participants in that discussion (and the likely emphasis of some industry comments in this proceeding) was an attempt to carve out special rules on rights-of-way usage for the telecommunications industry. In addition to the fact that the Commission has no authority to act in this arena, such a move to create special rules for broadband companies, exempting them from the

obligations undertaken by gas, electric, water, and sewer providers, is simply bad public policy.

VII. Federal and State Roles in Rights-Of-Way.

Paragraph 40 of the NOI asks for a comment on the distinction between federal and state "responsibilities" regarding the use of the public rights-of-way. While the federal government does have responsibility for rights-of-way on land within federal jurisdiction, the Commission's legal authority granted by Congress under Section 253 of the Communications Act does not provide the authority to regulate access to or use of rights-of-way within state and local jurisdiction.

Section 224 of the Act provides the one area where, absent state regulation, the Commission does have jurisdiction over the rates, terms and conditions for access to utility owned or controlled rights-of-way. In this narrow area of authority, the Commission has declined to provide a standard formula or methodology, stating that it lacks sufficient expertise to do so. It has specifically stated that it will rely on a case by case assessment, as a one-size fits all formulaic approach is unreasonable. The Commission has recognized in this context the difficulty of establishing a federal approach to a fact sensitive issue. See 13 FCC Rcd 6777, para 120-121 (1998).

A. Federal Lands and Rights-of-Way

While the federal responsibilities with respect to state and local management of the public rights-of-way are limited, we applaud efforts of the federal government to examine its own public rights-of-way policies with respect to land under federal jurisdiction. Many of the same issues considered by the Federal Rights-of-Way Working Group are encountered by local government in managing their rights-of-way. We note that the recommendations made by the Working Group provide the flexibility various federal agencies with right-of-ways management responsibilities require to implement these regulations.

B. While It Is Within The Authority Of States To Adopt Rules And Regulations Concerning The Administration Of The Public Rights-Of-Way, There Are Constraints That Come With State-Wide Policies.

States play a role to varying degrees in rights-of-way management. While some states have chosen to restrict the role of local government, we caution against such an approach as it denies local government the ability to provide solutions tailored to their communities' needs. Limitations placed on local governments in management of the rights-of-way hamstring local ability to address local needs such as traffic, public safety, revenue and liability. Where states can regulate the public rights-of-way, we believe management of the rights-of-way within local jurisdictions is best left in the hands of local government.

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[25] Texas Pub. Util. Code § 54.202

Unfortunately, a number of states have moved to enact laws preventing or limiting municipalities in creating their own networks. For instance, Texas through the enactment of its rights-of-way legislation prohibited municipal provision of telecommunications services.[25] Other states, such as Wisconsin, Missouri, Nebraska, Tennessee and Utah have placed restrictions on municipalities that limit their ability to provide broadband services.

We are disappointed with the recent U.S. Supreme Court ruling on *Nixon v. Missouri Municipal League et. al.*, which effectively allows for states to prohibit local jurisdictions from providing telecommunications services.[26] However, we do believe the Commission can benefit from views expressed in the Opinion of the Court, indicating that the respondents (i.e. local government) have "a respectable position" and "that fencing governmental entities out of the telecommunications business flouts the public interest."[27] We remind the Commission of the support for municipal entry in a statement by Commission Chairman Kennard and Commissioner Tristani accompanying the opinion issued on this matter by the Commission.[28] Their statements indicated that provision of telecommunications services through municipal utilities "would further the goal of the 1996 Act to bring the benefits of competition to all Americans, particularly those who live in small or rural communities in which municipally-owned utilities have great competitive potential." Furthermore, they state "The right policy for consumers is to have as many providers of telecommunications from which to choose barring entry by municipally-owned utilities does not give consumers that choice."[29] We believe it is appropriate for the Commission to reiterate this position, and emphasize that it is bad public policy for states to adopt rules that preclude creative solutions.

The FCC's Federal-State Joint Conference on Advanced Services as part of its review on "Government's Role in Broadband" cautions government to "Avoid 'one size fits all' approaches." If a state adopts rules and regulations governing the administration of the rights-of-way, it is important to consider the implication that state-wide policies have on all jurisdictions within the state. While the industry claims that it needs the certainty of uniform rules, regulations and fees to ensure broadband deployment at a rapid pace, such an approach has not necessarily resulted in faster or broader deployment. And, typically, any incumbent provider with a historical right to use of public rights-of-way will bristle at a new requirement to meet the same requirements of new entrants, especially where the local government attempts to level the playing field. It is debatable whether state-wide policies actually translate into more broadband lines be deployed. Experience shows that telecommunications providers continue to deploy in areas that represent the highest return on their investments, such as densely populated urban areas, giving little regard to the regulatory environment.

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[26] --- S.Ct. ----, 2004 WL 573799, (541 U.S.____, March 24, 2004).
[27] Id, Slip Opinion Pp 4-5.
[28] *In re Missouri Municipal League*, 16 FCC Rcd. 1157, at 1172-1173 (2001).
[29] Id.

For instance, in the State of Texas, in 1999 through enactment of HB 1777, Texas preempted local authority in management of the rights-of-way. Specifically, this legislation limits the compensation rate for municipalities and restricts the authority of municipalities in managing the right-of-way. Legislation such as in Texas does not alter the business considerations of telecommunication providers to deploy to areas that represent the highest profit margin. As a 2003 report prepared by the Public Utility Commission of Texas indicates, the incumbent local exchange carrier (SBC) had not deployed DSL to 69% of its wire centers.[30]

The problem of universal deployment of broadband will not be fixed through state-wide policies that serve to limit the authority of local government. These rules only serve to deny localities of innovative solutions toward meeting the demand of their constituencies for broadband access. In fact, with respect to broadband, the Federal-State Joint Conference stated "Gaining broadband access is fundamentally a local issue."[32]

VIII. Where Disputes Arise Between Industry And Managers Of The Rights-Of-Way The Courts Have Exclusive Jurisdiction.

Inevitably disputes will arise between industry and managers of the rights-of-way. In these cases, the courts have exclusive jurisdiction. The Commission should not use this proceeding to make any statement that might suggest otherwise. As the Commission no doubt recalls, after it filed an amicus brief in *TCG New York v. City of White Plains*,[33] language included in a footnote of that brief was read by many in the industry as a suggestion that the Commission would assert jurisdiction over rights-of-way matters. After the problems that this incorrect interpretation of the Commission's position was brought to its attention by LSGAC, General Counsel Jane Mago sent a letter to set the record straight. *See*, letter from Jane Mago to LSGAC, October 18, 2001, attached as Exhibit 8. The Commission should recall this problem, and ensure that it says nothing even inadvertently in this proceeding which would allow for a similar misinterpretation by the industry.

IX. The Commission Does Not Have Jurisdiction to Adopt Rules Preempting Traditional Local Authority Governing Rights-Of-Way Management

The legislative history of 47 U.S.C. §253 (Removals of Barriers to Entry) makes clear that Congress intended to promote the competitive deployment of telecommunications systems and services while preserving the traditional rights-of-way management responsibilities of state and local governments. 47 U.S.C. §253 states:

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[30] Report to the 78th Texas Legislature: 2003 Report on the Scope of Competition in Telecommunications Markets, Public Utility Commission of Texas, January 2003, at 36

[32] Broadband Services in the United States: an Analysis of Availability and Demand, Prepared By: The Florida Public Service Commission, Office of Market Monitoring and Strategic Analysis on Behalf of the Federal-State Joint Conference on Advanced Services, October 2002, at 55.

[33] 305 F.3d 67 (2d Cir. 2002), *cert. denied*, 123 S. Ct. 1582 (2003).

(a) In general -- No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

(b) State Regulatory Authority – Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

(c) State and Local Government Authority – Nothing in this section affects the authority of a State or local government to manage the public rights of way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights of way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

(d) Preemption – If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such state, regulation or legal requirement to the extent necessary to correct such violation of inconsistency.

Subsection (a) is a general prohibition against regulations that prohibit or have the effect of prohibiting the provision of telecommunications services. Subsection (b) is a safe harbor that protects state action such as the ability to impose universal service requirements and consumer protection regulations. Subsection (c) is a safe harbor protecting state and local (i) rights of way management authority and (ii) the right to recover compensation for private use of public rights of way. Subsection (d) creates authority for the Commission to determine whether regulations violate subsection (a), or fall within subsection (b)'s safe harbor. Even if the Commission were to conclude that the local rights-of-way policies were delaying the rollout of broadband services (and we strongly suggest they are not), it is for the courts, and not this Agency to decide whether the any of those local regulations address rights-of-way management and/or compensation issues, and thus fall within the safe harbor of subsection (c).

The precursors of the Telecommunications Act of 1996, H. R. 1555 and S. 652 were both introduced in 1995. The House bill did not contain any preemption provision. The language that became subsection 253(d) was added in Conference, and based upon §254(d) of S.652. The original language of §254(d) of S.652 required Commission preemption of any state or local government "statute, regulation, or legal requirement that violates or is inconsistent with this section . . ." After substantial debate, Senator Gorton (R-WA) offered a compromise amendment that was intended to preserve state and local authority over management of and compensation for the use of public rights of way. The

compromise offered by Senator Gorton clarified that the Commission's preemption authority under subsection (d) extended only to matters covered in subsections (a) and (b). Senator Gorton stated:

> There is no preemption . . . for subsection (c) which is entitled "Local Government Authority," and which preserves to local governments control over their public right of way. It accepts the proposition from [Senators Feinstein and Kempthorne] that these local powers should be retained locally, and that any challenge to them take place in the federal district court in that locality and that the Federal Communications Commission should not be able to preempt such actions.

Senator Gorton further stated that his proposal "retains not only the right of local communities to deal with their rights of way, but their right to meet any challenge on home ground in their local district courts." The Gorton amendment was passed unanimously on a voice vote.

On the House side, H.R. 1555 contained comparable prohibition of barriers to entry language in §243(a), provided a safe harbor for requirements that companies obtain construction or similar permits so long as those permits did not effectively prohibit the provision of service in §243(c), and restricted the imposition of any rights of way fees or charges that distinguish between providers of telecommunications services, including the local exchange carrier. In the floor debate on H.R. 1555, an amendment was offered by Rep. Joe Barton (R-TX) and Rep. Bart Stupak (D-MI), which essentially mirrored the Senate versions of subsections (a) through (c), but did not contain any specific preemption language in subsection (d). The House adopted the Barton-Stupak amendment by an overwhelming vote of 338-86. Rep. Barton noted:

> [The Amendment] explicitly guarantees that cities and local governments have the right not only to control access within their city limits, but also to set the compensation level for the use of that right of way . . . the Chairman's amendment has tried to address this problem. It goes part of the way but not the entire way. The Federal Government has absolutely no business telling State and local government how to price access to their right of way.

That Congress further intended to limit Commission authority and reject any implied preemptive authority over local and state government is set forth in 47 U.S.C. §601(c)(1), which states:

> NO IMPLIED AFFECT – This Act and the amendments made by this Act shall not be construed to modify, impair, or supercede Federal, State or local law unless expressly so provided in such Act or amendments.

The Conference Report explains:

> The Conference Agreement adopts the House provision [under §601] stating that the bill does not have any effect on any other Federal, State or local law unless the bill expressly so provides. This provision prevents affected parties from asserting that the bill impliedly preempts other laws.

The legislative record from both the House and the Senate, together with the Conference Report, clearly indicates that authority addressing access to and compensation for the use of public rights of way was reserved to state and local government, and the Commission has no jurisdiction to consider preemption of state or local regulations in this regard. Representative Stupak reiterated this conclusion in his letter to the Chairman Powell dated October 8, 2002, which was sent in connection with the Commission's Rights of Way Forum held October 16, 2002. A copy of that letter is attached as Exhibit 9.

X. Conclusion

Local government supports the timely deployment of broadband services to their citizens, as broadband is linked to the prosperity of local economies and the enhancement of quality of life. In addition, the need for a robust broadband marketplace is also becoming increasingly important as we approach an age of convergence through "IP enabled" services. It runs counter to the interests of local government, to stand as a barrier to broadband deployment.

Local governments play a necessary role in the management of public rights-of-way balancing the needs of their citizens and other users of the rights-of-way with the desires of broadband providers. In managing the public rights-of-way, local government, should not be viewed as an impediment to broadband deployment.

Local government is best viewed as a facilitator of broadband deployment. Given the flexibility to address their broadband needs, as demonstrated sometimes through innovative solutions, local governments are in the best position to collectively ensure the universal deployment of broadband. Therefore, we believe it is not in the best interest of the federal government or states to place constraints on local government.

We welcome the interest in the rights-of-way management process, as discussion helps to foster a better understanding of all of the affected parties roles and interests in the management of the public rights-of-way. In particular, we welcome the Commission's interest in rights-of-way management, but caution the Commission from taking actions that exceed the scope of its authority as granted by Congress.

List of Exhibits:

Exhibit 1 – *Making Sure No Citizen is Left Behind: A Report on How Local Government is Promoting the Availability of Advance Telecommunications Services to All Consumers*

Exhibit 2 – Excerpt from *a Local Officials Guide to Telecommunications and Rights of Way*

Exhibit 3 - Dissent of Commissioner Loretta Lynch

Exhibit 4 – Letter from National Associations to NARUC Leadership

Exhibit 5 – NATOA Comments to NTIA

Exhibit 6 – LSGAC Recommendations

Exhibit 7 – LSGAC Rights-of-Way Presentation for FCC Staff

Exhibit 8 – Letter from General Counsel Jane Mago to Kenneth Fellman

Exhibit 9 – Letter from Rep. Stupak to Chairman Michael Powell

Exhibit 1 – *Making Sure No Citizen is Left Behind: A Report on How Local Government is Promoting the Availability of Advance Telecommunications Services to All Consumers*

MAKING SURE NO CITIZEN IS LEFT BEHIND: A REPORT ON HOW LOCAL GOVERNMENT IS PROMOTING THE AVAILABILITY OF ADVANCED TELECOMMUNICATIONS SERVICES TO ALL CONSUMERS.

NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS

DRAFT REPORT

Part 1

I. INTRODUCTION

Local government officials want, need, and promote the universal availability of broadband infrastructure and the advanced services that such a network can support. Local government strongly believes universal access to broadband services is in the best interests of its constituents, both business and residential. Because of local governments' support of such services, the nation has been the beneficiary of the local government stewardship of the local rights-of-way and the resulting meteoric rise in the availability of broadband services.

The Federal-State Joint Conference on Advanced Services has released the most current study on broadband availability and demand and concluded: "The latest data show that rollout of broadband services …has progressed at an incredible pace. It has taken just five years for 80% of American households to have cable or DSL broadband available."[1] Local government takes great pride in these results and feel they have done much to promote broadband deployment, despite the protests of some carriers.

In this paper, the National Association of Telecommunications Officers and Advisors (NATOA), seeks to provide federal, state and local decision-makers with a list of illustrative examples of how local governments have promoted broadband deployment and the availability of advanced telecommunications services within their communities. This paper is not offered as a "Best Practices" paper, as local government has long asserted that its greatest strength is its ability to shape solutions to meet the needs of its locale and avoid a "one size fits all approach." Local government officials have never supported a national policy of broadband deployment "at any cost" to citizens. Such an unbalanced approach of unfettered broadband deployment results in taxpayers at the local level subsidizing private industry. Local government agrees with the recent statement of the Federal-State Joint Conference on Advanced Services, which counsels the following for rural areas, but is equally applicable for suburban and urban areas:

> **Avoid "one size fits all" approaches.** They are inappropriate and possibly discriminatory due to the underlying diversity of the participants…. [C]ase studies show that an appropriate solution for the open farmlands of Iowa may not be the same for the mountainous terrain of the Appalachians or the Western US [or urban America]. Local infrastructures also vary greatly. One small town may have a major fiber access line running past its borders. Others may have no fiber available and particularly poor quality copper lines to boot. Local demographics can vary just as widely. Age, education and income levels are all key factors driving demand and must influence deployment decisions. Appropriate solutions will be ones that meet unique challenges, not a rush-to-judgment government "fix."[2]

[1] *Broadband Services in the United States: An Analysis of Availability and Demand.* Published by the Federal-State Joint Conference on Advances Services (October 2002).

[2] Id at 55.

Local government believes that the success stories, outlined in this paper, reflect the benefits of local government retaining the authority to balance the needs of local taxpayers, businesses and other rights-of-way users, with those needs of communications providers.

II. BACKGROUND

It seems that local government has employed as many models to promote broadband deployment and the availability of advanced communications services as there are local governments. There appears to be three major techniques employed by local government to achieve these goals:

1. **Negotiate** for such deployment and services in exchange for access to municipal rights-of-way;
2. **Purchase** such services, thereby enhancing private-sector market availability; and
3. **Provide** such services, alone or in partnership, with the private sector.

This last category of providing such services, either alone or in partnership, has numerous models, that include:

1. **Independent communications utility** – e.g., Memphis Networx
2. **Non-profit entity** – e.g., Georgia Public Web, NOANet
3. **Strategic partnership with private-sector** – e.g., LaGrange, GA
4. **Lease municipal facilities to private-sector provider** – e.g., Anaheim, CA
5. **Sell municipal facilities to private sector provider** – e.g., Lynchburg, VA,
6. **Regional entities** – e.g., Oregon Central Coast Economic Development Alliance, UTOPIA in Utah, Tri-Cities in Illinois, Berkshire Connect in Massachusetts

III. BARRIERS TO BROADBAND

No discussion, however, on successful local government initiatives to promote broadband would be complete without addressing a damaging practice. The terms and tools of the Communications Act of 1996 have not generally been made available to promote broadband services and competition from municipalities themselves where the municipality is the provider of cable or telecommunications services.

Many states[3] have been persuaded by industry to enact laws forbidding local communities from providing telecommunications services, or imposing terms and conditions for municipal entry that would be unacceptable to any private sector provider. Making matters worse, the FCC and the courts have declined to employ federal preemption to override such laws.[4]

[3] States fitting into this category include: Arkansas (Ark. Code § 23-17-409); Georgia, Massachusetts (Massachusetts expressly authorizes cities and towns to provide communications services but imposes onerous voting requirements. M.G.L., Ch. 164, Sections 34, 35 and 36); Minnesota (requires municipalities to obtain a 65% super-majority vote in order to provide telecommunications services. Minn. Stat. Ann.§ 237.19.), Missouri, Nebraska, Nevada (Nevada Statutes § 268.086.), Tennessee, Texas (Texas Pub. Util. Code § 54.202) and Virginia.

[4] NATOA member Miller & Van Eaton has created "Street Law," an exhaustive list of cases Federal and state statutes, regulatory decisions and case law on issues arising from rights-of-way management and fees disputes. Visit http://www.millervaneaton.com for the most recent edition.

Three examples of barriers to local government entry may be found in the statutes of Texas, Virginia and Missouri.

a. Texas

While industry is quick to highlight Texas as a state with model rights-of-way rules, the Texas Public Utility Regulatory Act of 1995 ("PURA") contains a prohibition on municipal entry. The Texas Public Utility Commission petitioned the FCC to overturn the prohibition as violating the Section 253(a) of the Telecommunications Act. The FCC rejected the petition, holding that municipalities are creatures of the state and the state (through legislation) had authority to keep them out of the telecommunications market. *Public Utility Commission of Texas,* 13 FCC Rcd 3460 (1997). The D.C. Circuit later affirmed the Commission's rejection[5]. *City of Abilene v. FCC*, 164 F.3d 49 (D.C. Cir. 1999).

b. Missouri

In a similar petition, filed on behalf of Missouri municipalities, *Missouri Municipal League*, 2001 WL 28068 (F.C.C. Jan. 12, 2001), the FCC again refused to promote broadband deployments by means of voiding a state statute barring municipal entry. Unlike the Texas petition, the 8th Circuit Court of Appeals vacated the Commission's order and remanded the matter to the FCC *Missouri Municipal League v. FC*C, 2002 WL 1842319 (8th Cir., March 14, 2002). (The State of Missouri's Solicitor General has filed a petition for Certiorari which is pending.)

c. Virginia

In *City of Bristol, Virginia v. Earley*, 145 F. Supp. 2d 741 (W.D. Va. 2001), Judge James P. Jones held that the plain language of § 253(a) of the 1996 Act, includes cities among those "entities" whose right to entry is protected by the Act. As a result, he held that federal law preempted a Virginia statute forbidding municipal entry. The decision was later vacated as moot following enactment of corrective state legislation.

IV. THE OPPOSITE VIEW: STATES THAT PROMOTE MUNICIPAL DEPLOYMENT[6]

Not all states have prohibited local governments from offering communications services and many of the examples you will find in this paper are the result of such statutory freedom. Some states have enacted laws to grant express authority to provide communications services. These include Alabama[7], Arizona[8], California[9], and Florida[10], Oregon[11] and Virginia.[12]

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[5] At least two state courts have followed the FCC's interpretation of Section 253(a) as articulated in this matter and affirned by the DC Circuit. *Municipal Elec. Auth. of Georgia v. Ga. Pub. Serv. Comm'*n, 241 Ga.App. 237, 525 S.E.2d 399, 403 (1999), *cer*t. *denie*d, *Municipal Electric Authority of Georgia v. Georgia Public Service Comm'n* (Ga. 2000); *Iowa Tel. Ass'n v. City of Hawarden, I*A, 589 N.W.2d 245, 252 (Iowa 1999).

[6] Much of the material in this section comes from NATOA member Jim Baller. For more detailed information visit http://www.baller.com.

[7] Ala. Code § 11-50B-3.

[8] Rev. Stat. § 9-511(A), 9-514(A) (with voter approval).

Other states have provided partial limitations on what services can, and cannot, be provided. Examples of these states and their limitations include:

- Arkansas -- bars municipal entities from providing basic local exchange services, but not other telecommunications services.[13]

- Missouri -- prohibits the state's political subdivisions from providing all telecommunications services and facilities other than services to telecommunications providers (under certain circumstances), services for internal use, services for medical and educational purposes, emergency services and "Internet-type" services.[14]

- Nebraska -- prohibits public entities from becoming telecommunications carriers but allows them to offer "dark fiber" – fiber optic cable without the electronics required for transmission of information – under onerous conditions.[15]

- Tennessee -- bans provision of paging and security service but allows, after meeting certain requirement such as public disclosure, public hearings and a public vote, the provision of cable, two-way video, video programming, Internet and other "like" services.[16]

- Utah -- authorizes municipalities to provide retail cable and telecommunications services[17], but if they chose to go beyond retail, they are subjected to extremely onerous procedural requirements and substantive restrictions,[18] The law exempts provision of infrastructure to private providers and grandfather arrangements in effect on March 1, 2001. Local governments' answer to this law is outlined in Part Four where the UTOPIA project is discussed in detail.

V. ORGANIZATION OF MATERIALS

While many of the programs, services and negotiations are cross cutting, this paper is organized to offer the reader examples of "successful practices" organized into three sections:

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[9] California Const., Article XI, Section 9(a) and Cal. Pub. Utilities Code § 10001; 54 Cal. Atty. Gen. Ops. 135 (1971).

[10] Fla. Stat. Ch. XII, § 166.047; O.C.G.A. §§ 46-5-163(b) and 46-5-163(17).

[11] Oregon Revised Statutes § 759.020.

[12] Va. Code § 15.2-2160 (competitive local exchange services) and § 56-484.7:1 ("qualifying communications services").

[13] Ark.Code § 23-17-409.

[14] Revised Statutes of Missouri § 392.410(7).

[15] Neb. Rev. Stat. § 86-2304 *et se*q.

[16] Tenn. Code Ann. § 7-52-601 *et se*q.

[17] UT Code § 10-8-14.

[18] UT Code § 10-18-101 *et se*q.

1. Promoting Broadband through Negotiations;
2. Promoting Broadband through E-Government and Procurement; and
3. Promoting Broadband through Provision of the Conduit and/or Content.

In addition, NATOA offers two case studies of small to mid-size communities that have captured, in a limited number of words, their successful deployment strategies. In attachments A & B, the communities of Fort Wayne, Indiana, and Austin, Texas are featured. NATOA does not mean to suggest that these are the two best communities, as such would go against the grain of this whole presentation which seeks to demonstrate there is no such thing as a "best practice." These two communities are offered simply to reflect the successful practices of two communities that have sought to ensure that their consumers are connected to the broadband age.

NATOA would welcome your suggestions or nominations on other successful practices employed by local government to promote broadband deployment and the services such an infrastructure makes possible.

Part 2

ADVANCING CONSUMER INTERESTS BY MEANS OF NEGOTIATION

VI. Introduction

Municipal rights-of-way are scarce and valuable resources that most local governments own or hold in trust for their constituents. Not unlike the universal service requirements imposed on telephone companies by state governments in exchange for access to the states rights-of-way, local governments have sought to advance their consumers interests by requiring rights-of-way users, (primarily cable providers, but also open video system (OVS) and some integrated broadband providers) to negotiate terms and conditions that both enhance the marketability of the service providers offerings and the interest of local consumers.

This section of the paper identifies ways in which local governments, in seeking to advance their constituents' interests, have also advanced the deployment of broadband networks and the advanced services such a network makes possible.

VII. PEG and I-NET -- Broadband's First "Killer Apps"

Local governments have long recognized that development of innovative broadband applications may be the key to future economic development, as well as the more efficient use of public money to perform traditional governmental functions. Hence, not only are local governments concerned with the pace of the deployment of broadband cable systems, they are equally concerned with, and heavily involved in, promoting the use of the systems by seeking to promote "killer applications" of the technology. Two such applications of broadband technology are PEGs and I-NETs. "Public, Educational and Government" ("PEG") channels are just that. They are channels on the cable network dedicated to the delivery of non-commercial, local programming which advances a public, education or governmental concern. I-NETs or Institutional Networks ("I-NET") are broadband rings dedicated to connecting all of local

government institutions such as schools, libraries, fire and police stations, senior centers and municipal service buildings.

a. PEG

In its study, *Broadband Bringing Home the Bits*, the National Research Council suggested that PEG programmers may be able to provide a unique, local content-driven broadband application that spurs consumer demand for broadband -- i.e., a "Killer App." The National Research Council further concluded that additional efforts and additional resources are necessary at the local level to encourage development of competitive broadband facilities and applications.[19]

PEG access organizations, many of which receive their funding from franchise fees, are also heavily involved in promoting broadband use throughout local communities. For example:

- **Grand Rapids, Michigan**, has long been served by a non-profit organization, Grand Rapids Public Access Television ("GRTV"), which is responsible for managing the public access channels in Grand Rapids. The organization has evolved from a simple public access video programming production center into the Grand Rapids Community Media Center ("CMC") with community computer facilities, connections to the Internet, a mobile "Internet lab" that functions like the electronic equivalent of bookmobiles, and a wireless network designed to provide ubiquitous community networking.

- **Colorado Springs, Colorado,** has combined its government access channel with the Internet, fax, phone, and walk-in ability of consumers to conduct community-wide Electronic Town Hall meetings. The result has been an increase in participation, an ongoing dialog through critical decision making issues (i.e. budgets) and has increased the City's ability to educate citizens on issues. In the summer of 2002, Colorado Springs had critical issues with wild fire control and mitigation efforts. Interactive Internet strategies linked to educational video clips helped the City deliver key messages.[20]

- Just how accessible a PEG channel can be is exemplified in a town like **Evanston, Illinois**. On the first Monday of every month from 7:00 p.m. to 9:30 p.m., they hold a class entitled "Introduction to Community Television." In this class, participants learn about the purpose and history of public access TV, access services available, the policies and procedures of the PEG system and how to operate cameras for studio productions. Today, in this community of 75,000, in addition to the local government and individual schools, more than thirty-five community groups have been certified to conduct programming. The City also has cable television provided to all its public buildings such as libraries, police and fire stations, schools, and the Community Media Center where the above referenced cable access classes are held and offers a portable editing studio to City residents.

- The **City of Cleveland Heights, Ohio,** actively maintains three PEG channels and a public access studio. Through the PEG channels, the public schools, the City, and the public-at-

[19] *Broadband Bringing Home the Bits* at 4, 36, 107.

[20] *See* www.springsgov.com.

large are able to provide City residents with important information that has greatly assisted the City in maintaining its sense of community. Through its regulatory authority, the City has also encouraged high speed Internet access providers and other broadband service providers to install fiber conduit beneath its streets by requiring telecommunication providers to provide collocation, and conduit to accommodate additional telecommunication providers.

b. I-NET[21]

Many I-Net systems are based on plans created by representatives of the local government, who worked to identify the needs of the local government, other government agencies such as the schools, fires and police departments, as well as local constituents.

- The mission of the I-Net system in **Tacoma, Washington** is: "to provide government and educational organizations with the means to transport voice, video and data, at high industry standards, in a cost effective manner." Not a single government institution, agency or school is more than a quarter of a mile from access to the I-Net, which is called CityNet. Agencies are responsible for covering the costs of the last quarter mile, their end user equipment, installation and testing, as well as a monthly fee. CityNet enables users to share resources, and connects multiple locations, in a seamless pattern, into a single operation. This system has enabled users to move the computer and telephone, and video programming or training services off commercial or leased phone lines, at a considerable cost savings to the agencies, and in turn, the taxpayers of Tacoma.

- In **Portland, Oregon,** the City has created a large telecommunications carrier network called the Integrated Regional Network Enterprise (IRNE). IRNE serves local government, schools, county government, higher education and public safety. The IRNE consists of a fiber optic backbone providing a series of redundant rings around the region. This fiber backbone was built jointly by the City, various transportation and public safety entities, and municipal utilities. The IRNE interconnects to both the public switched network and the cable Institutional Networks ("I-Nets") to achieve last mile connections. It is able to offer very high bandwidth data, voice and video on a totally secure, totally redundant network at very low cost, thus encouraging broadband deployment and use. An end user can connect to the IRNE using a cable I-Net connection. But unlike all other I-Nets, the end user is not isolated on the I-Net, and not forced to egress through the cable company's Internet provider. In Portland, the IRNE is connected to all other commercial and non-commercial network service providers by collocating at Internet Hotel meet-me points in the City. IRNE allows users to have direct private WAN connections to ISP's of choice at an Ethernet level interface. There is NO gatekeeping by the cable company, the ILEC, the CLEC or anyone else. This creates a "perfect" open access architecture that promotes competition in the provision of advanced services to local governments…and ultimately, a successful service provider may be able to expand to provide advanced services throughout the community.

- The **Coral Springs, Florida**, franchise requires the Franchisee to construct an institutional network, and allows the local government to market capacity as part of its normal economic

[21] While INETs are discussed here, the reader will find that they are also the basis for a great many of the services that are outlined in Section III of this paper, the PROVIDE section.

development efforts. The City and cable operator share revenue derived from these capacity sales. Thus, the government is in a position to ensure that industries that wish to move into the area are guaranteed the broadband capacity they require. That encourages *economic* growth, and ensures that the Franchisee shares in the benefits from that growth. [22]

- In **Tallahassee, Florida**, with the INET as its backbone, the City has partnered with 20 private businesses to develop a wireless "Digital Canopy," that covers portions of the downtown and provides wireless connections of up to 6 MBps to any citizen who registers with the "Digital Canopy" program. During the pilot project, any citizen who owns a PDA or a laptop with a wireless card can easily register to use the network for free, allowing them to access e-mail, chat, download music, or listen to the radio while moving freely through the coverage area. [23]

- The **Miami Valley (Ohio),** Cable Council is changing its name effective January 1, 2003 to the Miami Valley Communications Council to better reflect its expanded role. This council of governments, with eight primary member cities and 20 affiliate members, has a combined population of 150,000. The Miami Valley Council, through is cable negotiations, has engaged cities, schools and libraries in the effort to achieve a network that can now be merged with the Greater Dayton IT Alliance (GDITA) to launch a regional network, the Dayton Metro Internet Exchange, or DMIX, within a year.

VIII. Bringing Local Schools and Libraries on High-Speed Line

Many communities have used renewal of the local cable franchise as a means to close the digital divide by ensuring that the cable system's institutional network offers high-speed Internet connections to schools and libraries – and to the patrons of those institutions. Some cable franchise agreements require the provision of free cable modem service in schools, libraries and government offices.

- The City of **Tacoma, Washington,** (population 194,000) provides a good example. The City's I-Net (CityNet) connects more than 200 city agency sites, including the school district, the police and fire departments, park facilities, libraries, universities, housing authority, and others. CityNet uses fiber optics to provide data and voice services to these locations, and coaxial cable to provide video distribution. The video component supports the transmission of broadcast quality video between City sites and more than sixty schools and higher education facilities.

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[22] *See* Institutional Network Agreement between the City of Coral Springs and Advanced Cable Communications, adopted, April 17, 2001.

[23] "The City's commitment as a partner in the pilot has two components: Infrastructure (facility/network access & power supply) and technical services. In the infrastructure component, we provided access points to City-owned fiber that is currently part of the traffic management system to support deployment of the antenna system for the WLAN, and power supply for the equipment associated with each antenna location. The City also provided access to City facilities as needed for placement of the antennas and associated equipment. Tallahassee's commitment in the technical services area includes assistance to the vendor/contractor for siting/placement of equipment, network access and/or power interconnection recommendations, and some limited staff assistance with installation or testing of the WLAN components." *See* http://talgov.com/citytlh/utilities/ubcs/wlan.html.

- The City of **Santa Clara, California,** (population 102,000) has a different system that addresses this much smaller city's needs. The Santa Clara I-Net connects 36 sites to a central facility. These sites include libraries, county facilities, fire stations, and all high schools. The I-Net is connected to the Internet; so by connecting the library to the I-Net, the community is able to provide a high-speed connection to the Internet for researchers and for members of the community who could not afford such a connection to their homes or businesses.

- The **Evanston, Illinois,** (population 75,000) has cable provided to all public buildings including the Library, Police and Fire Departments, and School Buildings.

- In **Fort Wayne, Indiana**, they partner with the Digital Kids Initiative (Northeast Indiana Innovation Center) to link information technology programs with lower-income children.

- Examples of this type of franchise language may be found in **Ventura, California,** (, ? Franchise § 10.11) and **Madison, Wisconsin,** (Code of Ordinances § 36.19).

- In **Contra Costa Mesa, California,** the cable franchise has allowed the City's libraries to offer free Internet access. While in **Scottsdale, Arizona**, not only is free access available, so too is a PC reservation system that requires users to input their library card number.

- The **City of Cleveland Heights, Ohio,** through cable television franchise negotiations, obtained a broadband network dedicated to the City and its institutions which provides high-speed access to all City, library and school buildings. The system enables the City to perform security monitoring, communicate with all safety forces in the event of an emergency, provide video conferencing between the Community Center and other public buildings, and provide data transmissions throughout the City. Ensuring the Broadband Network is available.

Local governments have long employed cable franchise agreements as a means to promote advanced services. Local governments achieve this goal by establishing bandwidth, node size, and other requirements designed to ensure that the system to be built is capable of providing reliable cable modem services. Franchise agreements often include a categorical requirement to provide some form of Internet/broadband interactive services. Examples of such requirements may be found in the cable franchise agreements of:

- St. Paul, Minnesota; [24]
- Ventura, California; [25]
- Madison, Wisconsin.[26]

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[24] St. Paul, MN, Franchise.

[25] Ventura, CA, Franchise § 7.1.4 (upgraded cable system must "include the facilities and equipment…required to support broadband interactive cable services").

[26] Madison, WI, Code of Ordinances § 36.23.

- In **Mentor, Ohio**, the cable franchise contains a clause requiring the operator to maintain the cable system at the state of the art. When the company refused to upgrade its system, the City notified the company that it was out of compliance with its obligations; the company ultimately agreed to a deadline for upgrading its system.

- In **Fort Worth, Texas,** through the use of its I-NET and rights-of-way franchise fees, has been providing Internet access has been provided for the public since 1995 through the use of city, state and grant funding. Initially the access was text-only on dumb terminals. Today, access on the approximately 200 public Internet workstations is full graphic high speed. But the City has gone beyond the infrastructure of connections. The City provides public classes in computer basics, Windows, e-mail, Internet, as well as the Microsoft Office products. The City recently provided 60 hours of basic computer skills to public housing residents who received free computers as part of a relocation agreement.

IX. Banning redlining: Ensuring that broadband is available to all

In addition to promoting broadband, local governments have found that they must act to ensure that no community or set of constituents is left behind.

- In **Broward County, Florida,** where a report issued in June 2002 concluded that AT&T Broadband had concentrated cable system improvements in largely white neighborhoods, leaving minority communities with less opportunity to receive advanced services, the City was forced to take the operator to court.[27]

Examples of other local governments acting to ensure that no constituent is left behind may be found in:

- Section 5 of **Mountain View, California's** franchise provides that, "*cable service* must be provided upon request to any potential Subscriber."

    - In **Ventura, California,** an operator is prohibited from denying access to "or otherwise discriminating against Subscribers" based on "race, color creed, national origin, sex, age, conditions of physical handicap." Service may not be denied "because of the income of the local area in which" a potential subscriber resides.[28]

    - The franchise in **Arlington County, Virginia** states that service will be extended to low income areas at least as quickly as in higher income areas.[29]

    - In one of the **City of Los Angeles, California's** franchise areas; the operator upgraded substantial parts of the system serving the franchise area even though (according to the

[27] Dwayne Campbell, *Report Blasts AT&T Broadband*, South Florida Sun-Sentinel, June 12, 2002 at B1.

[28] Ventura, CA, Franchise § 16.3.

[29] Arlington, VA, Certificate of Public Convenience and Necessity, §5.9(c).

company) it was not obligated to do so. However, one of the lowest-income areas served by the company was left out of the rebuild, and the company now contends that it will take years to provide equivalent service to that area. This is not a question of *subscribers* opting not to take the service – it is a question of the operator leaving an urban neighborhood off the information highway. The City is now taking action to force the operator to stop the redlining.

X. Requiring Availability to Public Institutions

Some cable franchise agreements contain provisions designed to ensure that public, educational and governmental users of the system will be able to take advantage of cable's advanced interactive capabilities, so that, as technology evolves, the ability of the community to communicate critical information effectively also will evolve.

- **Ventura, California**, Franchise § 10.8;
- **Arlington, Virginia**, (Exhibit C to Certificate, providing for two-cable modem service for County government use).

Part 3

ADVANCING CONSUMER INTERESTS BY MEANS OF PROCUREMENT AND E-GOVERNMENT

XI. INTRODUCTION

In addition to the need for killer applications of broadband technology to promote broadband deployment, federal and state government agencies are increasingly advocating the need for local government to "prime the pump" for such applications, through both promotion and procurement of advanced services.[30] In this section of the paper we will offer examples of success practices to bring broadband services online in local communities by means of the procurement process.

XII. E-GOVERNMENT: THE ROLE OF LOCAL GOVERNMENT AS PROMOTER OF ENHANCED SYSTEMS

Local government is doing more than its share of priming the broadband pump by means of expenditures on "e-government" activities. Gartner Dataquest predicts that state and local e-government spending will grow to $6.5 billion by 2005. This represents a 35 percent annual growth rate when measured against this year's $1.9 billion total. Gartner Dataquest also projects that state and local governments this year will spend more than the federal government on e-government. These expenditures also ripple through the economy.

According to rankings from Washington Technology magazine, IBM and Electronic Data Systems are the leaders in state and local e-government revenue, with more than $1 billion annual revenue apiece. Accenture, KPMG Consulting, Lockheed Martin, TRW, and Unisys

[30] In its October, 2002 report, The Federal-State Joint Conference on Advanced Services (see note 1, supra) stated "Government can enhance the value of Internet access and increase demand for it by enabling more businesses and individuals to access information and do business online. Florida is an example of how e-government initiatives can draw more people to Internet use. Florida launched the MyFlorida.com website, where citizens, public and private organizations and visitors can access information and do government business online.

follow with $500 million to $1 billion in revenue. Industry experts and company officials say the main drive in e-government for the next several years will be to bring traditional applications online, though other opportunities in wireless systems and voting hardware are being tested.[31]

Local governments are investing in e-government initiatives because of the benefits provided to constituents, including: improved citizen access to information; enhanced customer service while supporting higher volumes of transactions with the public; reduced operating costs for providing expanded public access to information and services; improved communication and interaction with the community; better education by enabling distance learning and video training, as well as improving connectivity of schools.[32]

- The **City and County of Denver, Colorado,** created its Denvergov.org website to bring services to its constituents. As of last summer, only two years after inception, the website provided 40,000 pages of content for more than 7,000 user sessions per day.[33] Citizens can pay water bills, register bicycles with the police, download a handicapped parking sign application, and sign up for residential recycling services at the website.

- In **Montgomery County, Maryland**, the County created a "portal," or a website that acts as a gateway to information and services found on the Internet. This citizen-centric model helps guide the citizen through the County government. As of March 2001, the portal receives two million hits a month, with 60,000 unique users per month. 35% of all Department of Recreation registrations were received via the portal, along with 50% of all transit pass sales applications.[34] Citizens can access county traffic cameras and pay property taxes electronically via the website.

- The **Miami Valley Cable (Ohio) Council** created and pays to host Internet home pages for its member cities and is working to expand into e-commerce and e-government applications. A major impetus for this effort is the council's intent to make city services more accessible and useful for clients, especially commercial and industrial users.

- **Redondo Beach, California,** has just embraced an e-government strategic plan to facilitate the electronic delivery of accurate, up-to-date information to the public in the most effective, user-friendly, and easy to manage. The new site went live in September 2002. The site offers the public 24-hour access to the City through thousands of web pages representing all City services, departments, commissions and boards. In addition, it guides the user to links with online information from other agencies including schools, Chamber of Commerce and Visitors Bureau, Beach Cities Health District, as well as County, State and Federal offices. As it evolves to match the City's e-government vision, the new site will become the portal

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[31] William Welsh, *E-Gov Drives State and Local Market,* Washington Technology, Feb. 19, 2001, Vol. 15, No. 22, at 261.

[32] *See* Tony Rybczynski, *Optical Ethernet*, NATOA Journal of Municipal Telecommunications Policy, Fall 2001, at 31.

[33] Byron West, *A Content Management Solution the Works*, NATOA Journal of Municipal Telecommunications Policy, Summer 2001, at 11.

[34] Kevin Novak, *E-Montgomery*, NATOA Journal of Municipal Telecommunications Policy, Summer 2000, at 23.

for a rich array of online services that are currently or soon-to-be in development, including online class registration, request tracking, permitting, virtual tours, video streaming, mapping and more. Visit the new Web site at www.redondo.org.

XIII PROCUREMENT AS A MEANS TO PROMOTE DEPLOYMENT

In addition to e-government, local government can be a very heavy user of telecommunications infrastructure, often running the largest inter-building network within a community.

- **Chicago's** CivicNet project promises to bring prompt and affordable fiber connectivity, not just to the City government's 1600 sites, but also to thousands of other organizations, including businesses, schools, libraries, hospitals, community centers, churches and even individuals. By aggregating the $25 million in annual telecommunications expenditures of the City's agencies, and holding out the promise of substantial user fees paid by the others using the system, the City has given itself sufficient clout to attract private-sector partners who will build and operate the CivicNet system in accordance with the City's goals and specifications.

XIV IMPROVING AND CONSOLIDATING MUNICIPAL NEEDS -- THE CASE OF MARTIN COUNTY FLORIDA

Martin County, Florida, is a medium-sized (124,000) permanent coastal community 45 miles north of Palm Peach. The County's experiences provide a helpful example to the reader of the explosion in the types of telecommunications and technology services local government uses and the efforts taken by local government to improve and consolidate such services resulting in the promotion broadband deployment. (See also discussion of DC NET on p 23.)

A recent study, which documented the governing process of Martin County, generated 1.4 million pages each year. Because Florida Statute 119, (Public Records Law) requires that all government transactions be conducted in public, the County has been forced to address the challenges of conducting its regular business "in the sunshine" and being able to produce copies of documents "on demand" while not creating undue hardship workloads on the various departments. These efforts have taken two approaches: the first has been to instill the public records requirements throughout the organization's operational policies. The second has been to implement technological programs and practices that minimize, or eliminate replication and redundancy and maximize efficiencies.

The County has moved from 1989, when the 760+ employees had but a single Tandy TRS-80 and a Wang OS 70 for basic word-processing to a County with a full service homepage[35]

[35] The County published its first web page (actually 20 pages altogether), and established its presence in Cyberspace. From this humble beginning the county's website now has more than 60,000 pages, automatically growing by roughly 600 pages a week. The majority of web pages are documents that appear on the County Commission agenda and are in constant demand by the public. In addition, zoning maps and tax records are available, and a web interface for building permits and inspections will be rolled out by the fall. The site averages 1200 visitors a day. Among the most popular pages, among both the public and the press, are County Commission correspondence, and the "Beachcam" (The Beachcam is a byproduct of a beach erosion monitoring program, partly funded by the

supported by a County wide software system with document conversion features to supply the web site. The County is also in the process of interconnecting all of its buildings with a dedicated Institutional Network.

Bandwidth and reliability requirements have increased in step with the number of desktop computers and county government connected locations. The County's network has also evolved through various configurations (terminal concentrators, hubs, routers and bridges as well. The County has employees its own fiber to link three buildings, with the other 21 buildings linked by a mix of dial-up, ISDN, leased lines (fractional T1, T1, and T3), and frame relay.

The County is looking to expand this network to meet its needs for bandwidth and reliability. The County would like to add 25 buildings to its network over the next several years, and would like to upgrade all locations to fiber-optic connectivity at Gigabit speeds. (They are actively contemplating such an INET requirement in their next cable renewal negotiations.) The County is also considering various options for consolidating the networks supporting telephone service and video links (notably police-courthouse links used for arraignment hearings). The primary obstacle to network growth is the high cost of inter-building connectivity -- whether obtained by purchasing services from carriers or by installing County-owned cable. Overall, the County's essential need is for fiber-optic cable linking all of its buildings at an affordable cost.

Part 4

FROM THE SEWERS TO UTOPIA: PROVIDING CITIZENS WITH ACCESS TO BROADBAND SERVICES

INTRODUCTION

In the first two sections of this paper, NATOA explored the ways in which local government has sought to promote broadband deployment and leave no constituent behind through franchise negotiation and marketplace support via the procurement process and e-government. In this section we examine examples of where local government chose to provide the service themselves, in partnership with a private sector company or as part of a regional utility district.

PROVIDE MUNICIPAL FACILITIES/TRANSPORT TO PRIVATE PROVIDER

Many local governments are partnering with private sector companies to ensure that constituents have access to broadband services. Some cities have found that they could best serve their constituents by building, either alone or in concert with other local government, public networks that are both wireline and wireless, that private carriers might use to reach the end customer. Others have found that they could best serve their constituents by opening their unique municipal telecommunications ducts, known to others as sewers. Granting access to the sewers has permitted at least one private sector company with a faster, cheaper and less disruptive method to build out a high-speed network. Below are examples of local governments providing their

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Department of Environmental Protection). Other favorite pages include several pages on case dispositions, maintained by one of the judges, and the tax/appraisal page. The website can be visited at www.martin.fl.us.

constituents with access to broadband services, while not actually being the provider of the content.

c. UTOPIA

The Utah Telecommunication Open Infrastructure Agency, ("UTOPIA"), is a political subdivision of the State of Utah, formed by 17 Utah municipalities to study and then, if it is determined to be feasible, construct a high-speed "Fiber to the Home," and "Fiber to the Business" telecommunications network that would be used by the private sector to offer a variety of competitive voice, video, data, and other advanced services to every residence and business, within the boundaries of the participating cities.

The local governments that comprise UTOPIA currently represent more than 500,000 people and approximately 180,000 dwelling units. Ultimately, UTOPIA would build a carrier-class fiber network to hundreds of thousands of households and thousands of small, medium, and large businesses throughout UTAH. UTOPIA will only provide the transport for the private sector to utilize. All services would be open to any providers that meet the protocols for using the network. The founder of UTOPIA hopes that, because a provider will not need to fund the huge capital outlays to build a proprietary network, the network will create competition as operators may dedicate their resources to content and customer services.

d. Lynchburg VA

Unlike UTOPIA, Lynchburg, Virginia has gone it alone. They built and sold their 42-mile fiber-optic network to CFW Communications (now nTtelos) for $1 and in return received:

1. 30-year irrevocable right to use all of the fibers it had previously been using;
2. Eight (8) fibers on all new routes in the City;
3. Operator's guarantee to offer broadband services to 95% of addresses in City within four years; and
4. The best telephone rates in Virginia for 10 years.

e. CityNet Cities

The **City of Albuquerque, New Mexico,** was the first city to deploy a high-speed last-mile fiber optic ring network by laying a fiber optic network throughout its sewer system. Other cities making their sewer ducts available for such deployments include **Indianapolis, Omaha, Dallas, Fort Worth, Scottsdale, St. Paul, San Francisco and Pittsburgh**.

In an effort to provide broadband to constituents, without the invasive process of trenching and attendant traffic disruptions, the cities allowed CityNet to deploy its robot known as SAMSM (Sewer Access Module) to navigate through the sewers as a means to provide bandwidth. Pittsburgh Mayor Tom Murphy, in announcing his City's agreement, outlined his reasons for permitting the vendor access to the City's property. "Fortune and

Global 500 companies all require state-of-the-art, high-speed broadband communications."

f. McAlester Oklahoma

According to the *McAlester News-Capital & Democrat,* residents of McAlester, Oklahoma, can soon sign up for broadband wireless access to the Internet thanks to a project backed by the City and the Oklahoma Municipal Services Organization (OMSC), a non-profit organization created by the Oklahoma Municipal League. The OMSC contracts with companies for wireless network installations in the state's cities and towns. In addition to McAlester, the networks are being installed in Checotah, Okemah and Stillwell, and have been installed in Durant, Norman, Purcell and Lexington. McAlester sees the wireless network as particularly beneficial to businesses and emergency responders. Doctors can download image files faster, and police and fire fighters can have real-time connections to services such as the Federal Emergency Management Agency. The City paid $290,000 for the system that came in $2,000 under budget. Those who sign up for the service will see the charge for it on their City water bills.

g. Tallahassee Florida

In Tallahassee, Florida, the City has partnered with 20 private businesses to develop a wireless, "Digital Canopy" covering portions of the downtown and providing wireless connections of up to 6 MBps to any citizen who registers with the "Digital Canopy" program. During the pilot project, any citizen who owns a PDA or a laptop with a wireless card can easily register to use the network for free, allowing him/her to access e-mail, chat, download music, or listen to the radio while moving freely through the coverage area. [36]

h. Fixed Wireless Where Fiber Won't Work

Even in sparsely populated areas, in which fiber-based networks may not be infeasible, local governments have stepped forward to bring themselves and their constituents into the 21st Century. Examples include: Washington County, Ohio,[37] Greenup, Illinois,[38] and the Missouri Basin localities of Keokuk, Iowa, and Sioux Falls, South Dakota,[39]

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[36] "The City's commitment as a partner in the pilot has two components: Infrastructure (facility/network access & power supply) and technical services. In the infrastructure component, we provided access points to City-owned fiber that is currently part of the traffic management system to support deployment of the antenna system for the WLAN, and power supply for the equipment associated with each antenna location. We also provided access to City facilities as needed for placement of the antennas and associated equipment. Our commitment in the technical services area includes assistance to the vendor/contractor for siting/placement of equipment, network access and/or power interconnection recommendations, and some limited staff assistance with installation or testing of the WLAN components." City of Tallahassee, http://talgov.com/citytlh/utilities/ubcs/wlan.html.

[37] McKay, *Rural Ohio Creates Its Own Connectivity*, Government Technology (September 1, 2000), www.govtech.net/news/news.phtml?docid=2000.09.01-2030000000000236.

[38] Van & Tatum, *Wireless Broadband Service Migrates From Silos To City*, Chicagotribune.com (May 14, 2001), http://chicagotribune.com/business/printedition/article/0,2669,SAV-0105140045,FF.html.

[39] [19]Recinto, *Broadband Comes to the Corn Belt*, Red Herring (May 18, 2001), http://www.redherring.com/index.asp?layout=storyimu&doc_id=350019435&channel=10000001.

which are all working to implement fixed wireless solutions. Numerous other satellite and terrestrial possibilities are also under development.[40]

i. Promoting Wireless by Providing the Platforms

Wireless broadband is a wave of the future and the **City of Dubuque, Iowa**, population 59,000, is riding on the crest of the wave. Because the city rests on, and below, the wooded limestone bluffs of the Mississippi River, there are challenges to the propagation of wireless radio and television signals. The City recognized the importance of balancing the need for competitive wireless telecommunication services with order, efficiency and sensitivity in the placing of new towers and antennas. After an independent analyses and public hearings the City identified City-owned properties, such existing water towers, communication towers, government building rooftops and parkland, as potential tower and antenna sites. Combined with an expedited permitting process, the City's objective has been to offer incentives for location of antenna facilities on existing structures, and for maximum collocation of facilities on a single structure. The plan is working very well[41], and has brought favorable comment from various cellular/PCS carriers.

COMMUNITY PROVIDED SERVICES[42]

According to the American Public Power Association[43] there are currently 59 communities that offer their constituents cable modem services through the local public power company or public utility district. There are 107 communities that offer ISP services. Below we outlined the programs of ten such communities.

1. Ashland Fiber Network

Ashland, Oregon is a town of 20,000 located 14 miles north of California on I-5. It is the home to Southern Oregon University and the Oregon Shakespeare Festival. The City operates its own municipal electric and communications utility. The City began providing communications services when the incumbent ILEC refused to provide DSL and cable complaints grew too loud. Today the City provides high-speed data, cable modem Internet and cable television services to business and residents. High speed data is designed to meet the needs of customers who require large amounts of bandwidth. It is sold in .5mB increments with the prices set at $315/ .5mB.

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[40] [20]A technology that is not promising at all is broadband through plumbing facilities, *Waternet: Harnessing Water's Power For Broadband Communications*, http://www.dutchwater.com.

[41] Five cellular/PCS sites are now located on City water towers. A sixth is atop a new monopole tower with available collocation capacity in a City park. Two new City water towers are being designed to accommodate wireless antennas, cabling, and ground-based equipment facilities. Also, the City assisted Dubuque County and a PCS provider in replacing an old county-owned communication tower with a taller commercial structure offering more co-location opportunities, onto which the county's own public safety radio antennas were relocated free of charge. During this period, only one new proposed cell tower was rejected by the City due to proximity to and impact upon a historically and environmentally sensitive neighborhood. Overall, six cellular/PCS service providers and one wireless Internet Service Provider now operate throughout Dubuque, and 24 new sites have been constructed within the City limits with a net gain of only 3 towers.

[42] Many thanks to Ron Lunt of the American Public Power Association for providing the material for this section.

[43] *See* http://www.appanet.org/legislativeregulatory/broadband/index.cfm.

AFN is one of the first networks to offer an open-platform Internet service. Cable Modem Internet service is wholesaled to nine certified ISP for $17.85/month for residential service and $63/month for business service with one fixed IP address while the system's CATV offers a variety of tiers of services. As of July 1st, 2002, the City had 2,499 CATV customers and 2,371 cable modem customers. This is out of a total of about 8,500 homes passed or about a 29.4% penetration for CATV.

The City's actions have benefited consumers in both providing access to broadband services and creating a competitive environment. The incumbent cable provider (new since the City's system was built) has rebuilt its network and offers competitive pricing to that of that City, at almost 30% lower than it offers comparable services in the surrounding areas.

2. ***Vineland, New Jersey***

Vineland is a community of approximately 55,000 people located in south central New Jersey. The City of Vineland and the Vineland Board of Education combined to create a Metropolitan Area Network (MAN) in the late 1990's to provide high-speed data transfers, email and related communications between the parties. The goal of the network was to develop an infrastructure of connectivity that would result in a complete information-based community, including training and curriculum-based applications.

The MAN contains 28 miles of fiber optic cable and connects 12 City buildings, 21 school system buildings, as well as the local community college. This network connects 3,000+ personal computers and 50+ computer labs to the network via a 10/100 Megabit-per-second (Mbps) Ethernet connection.

3. ***Coldwater, Michigan***

This community, of approximately 10,000 people in south central Michigan, in 1998 began operating a broadband Hybrid Fiber Coaxial (HFC) network to connect all residents and businesses to a citywide Wide Area Network (WAN). The WAN provides local high-speed data transport, high-speed Internet connectivity and competitive CATV services to all residents of the community. It also connects all the schools to the WAN to ensure that the administration, teachers, and students had access to the broadband network. This is vast improvement over dial-up access to which most of these institutions were limited. As of January 31, 2002, CBPU had 2,153 CATV customers, with 1,183 of them subscribing to a 1 Mbps down/512 Kbps up, high-speed Internet service. They charge $14.95 for the dial-up ISP service, $26.25/month for the residential cable modem services, and offer a suite of choices for business/industrial customers.

4. ***Glasgow Electric Plant Board (Glasgow), Kentucky***

Glasgow is a community of approximately 14,000 people, located about one hour from Louisville. Glasgow's original intent in constructing a broadband communication network was to improve the operations of the electric system by installing a system to monitor and control electric substations as well as load management devices at the resident's homes. As the project developed it became apparent that the system could also support CATV and high-

speed Internet services to all citizens of the community. Local educators touted the impact high-speed access that the Internet could have on the education of the students.

In May of 1989, the first CATV customers began receiving services from the Glasgow system. The school system began to utilize the broadband network for distance learning in August 1992. In October 1993, the schools opened up access to their computer system, allowing the students to transmit and access data from home. To further connect the city with the school, the school system can launch video from any classroom to every television set in the city.

The broadband system consists of a 120-mile HFC network, transmitting data at 4 Mbps. The residential ISP service is priced at $14.95 for the city residential residents and $19.95 for county residents, plus $9.95 for the cable modem and they offer numerous commercial packages for the city/county businesses. They have approximately 2,000 personal computer workstations connected to the broadband network and estimate that they have saved the citizens of Glasgow at least $2 million dollars on their high-speed Internet service as compared to industry pricing.

In April 2001, Glasgow purchased the CATV infrastructure previously owned by Comcast. This system consists of 200 miles of cable plant and serves 3,400 customers. Glasgow is in the process of upgrading this system to provide broadband communications to all customers.

5. ***Cedar Falls, Iowa***

This community of about 34,000 people in central Iowa feared it would be left behind the "information" age. Today it has a high-speed network that passes almost every home (12,200 homes), provides CATV service to 7,400 homes, including 4,500 cable modem users, and provides special services to 48 commercial accounts. In addition to providing a network that provides up to a 10 Mbps data connection, the system also uses the network to provide electric system communications, electric load management services, and for the large commercial/industrial customers they offer a broadband network that provides T1 point-to-point services, Ethernet point-to-point or multiple point services, or DS3 services to name a few. The network also connects the 12 school buildings to HFC network to enhance the schools connectivity to the community. Small businesses may subscribe to cable modem services with either a 4 or a 10 Mbps Internet connection; residential customers receive a 4 Mbps ISP connection for $30.00/month.

6. ***Muscatine, Iowa***

Muscatine is a community of approximately 23,000 residents, located in southeastern Iowa. In 1996, a community taskforce completed a study indicating that residents were unhappy with the current communication providers. The community performed a feasibility study, the residents passed a referendum with a 94% approval rating, and construction began on a network capable of supporting high-speed Internet service in October 1999. In addition to the cable modem service, they offer a dial-up ISP service, DSL service, numerous commercial ISP services, and CATV services The network , a hybrid fiber system (HFS) passes every home in the community with 125 homes per node. The broadband network can deliver residential customers data traffic at 4 Mbps downstream and 1 Mbps upstream.

Charges range from $24.95 per month for the dial-up ISP services, $39.95 for a 512/256 Kbps residential ISP service, and 7 different commercial services with varying speeds and prices.

7. Harlan, Iowa

Harlan is located in western Iowa and has a population of approximately 5,200 people. Because of the lack of advanced services from the incumbent providers, in May 1995, 71% of the voters approved the establishment of a telecommunication utility. In 1996, HMU built their own HFC network, which consists of 9.3 miles of 60-strand fiber optic cable and 34 miles of coaxial cable (HMU, 2002, CompuServe). The system was constructed with the intention of implementing an electric load management system, providing CATV service, implementing electric system protective relay diagnostics/programming, installing a SCADA system, and providing high-speed Internet services (Ansari & Chambers, 1996). In addition, the education facilities plan to be connected to the system and, according to an article written by Barnaby Feder, "This is opening up the world to our kids," said Ken Sprague, the technology coordinator for the local school district, who can now simultaneously connect 290 student at the three schools to one another…" (1997, p.2). As an example of what the municipal network will provide to the community, the system will connect the Harlan and Shelby County governmental offices (i.e. fire hall, utilities building, City hall, courthouse, library, etc.) the Chamber of Commerce, and the Shelby County Hospital to the high-speed Internet network (Ansari & Chambers, 1996). According to HMU, the data transfer capability of the system is 10 Mbps, while the commercial fiber optic network has the capability to transfer 155 Mbps. They offer the residential customers two cable modem options; the 1.54 Mbps services is priced at $44.95/month, while the 10 Mbps service is $54.95 per month, both of which include cable modem rental. Both of these services are discounted $10/month, if the customer also subscribes to the HMU cable TV service. HMU offers the commercial customers several options, depending on the needs of the customer and they launched telephone service in October 2001 (HMU, 2002, CompuServe). According to a survey taken by the author in March 2000, of the 2,200 homes passed, 400 of them subscribed to the high-speed Internet service.

8. Thomasville, Georgia

This is a community of almost 18,000 people located in southwest Georgia. They developed their own ISP service in the early to mid 1990's to provide CATV and Internet service. They developed an HFC network to provide these services after local industry complained about paying approximately $1,000 per month for connectivity to the Internet and residents had no access to a broadband network. They currently have about 22 commercial users connected to the network, including the hospital, schools, industry, and the county/municipal government. The school is connected to the network through a DS3 connection, which provides a data transfer capability of about 45 Mbps. The network passes approximate 11,000 homes, of these 5,117 subscribe to residential CATV and they have approximately 2,800 cable modem subscribers paying $28.95 per month for a 256 Kbps connection. They offer other packages to commercial/industrial customers at varying rates and services, dependent on the need of the user. They also provide a free learning center to help educate the community on the use of the Internet (Berry, 2002).

Thomasville is in the process of expanding their network to three neighboring towns, Camilla, Cario, and Moltrie. Thomasville provides the headend facilities for both the CATV and the ISP services and performs all the retail billing for the broadband network. While the network is less than 50% complete, they have already captured about 35% of the CATV market, with approximately 20% of subscribers taking the high-speed Internet service. When the system is complete, it will pass almost 29,000 homes.

9. Hawarden, Iowa

Hawarden is a community of about 2,500 people located in northwest Iowa. In the early 1990's, the City leaders kept hearing that if they wanted high-speed Internet they would have to build it themselves. In October 1994 they placed the question in front of the voters and 95% of them approved the creation of a broadband system. Due to numerous legal actions, the operation of the CATV system didn't start until the fall of 1997. They started offering telephone service in 1998 and added broadband Internet in 1999. The HFC system is comprised of 3.5 miles of fiber optic cable, 35 miles of coaxial cable and includes nine nodes. They created a municipal network to connect the City hall, schools, fire and police departments together to facilitate the transfer of data over a local high-speed network. Of the 1,000 homes passed, they have 50 cable modem subscribers, charging $49.95 for the 256 Kbps connection (Lunt, 2000). They offer a $5.00 discount if you use their local phone service and an additional $5.00 if you include long distance service.

10. Scottsboro, Alabama:

Scottsboro is a community of approximately 14,500 people located in northeastern Alabama. Scottsboro discussed developing a communication system to provide improved CATV and high-speed Internet services in the early 1990's. After hearing the discussion, the incumbent provider rebuilt their cable system in 1992 in an attempt to improve services. Between 1992 and 1997, however, that same incumbent doubled their CATV rates, offering 51 channels for $43.60 per month. The community chose to serve itself in December of 1997 and constructed a 185-mile HFC network. The system is used to provide electric system communication and control, provide dark fiber to the schools, and provide CATV and high-speed Internet services to the residents and commercial customers. The broadband system passes approximately 6,600 homes, serves 3,770 CATV customers and has 1,580 cable modem subscribers. High-speed Internet service to the residential customer is offered for $20.00 per month plus $8.00 rent for the cable modem and they transmit data at a rate of 512 Kbps downstream, 256 Kbps upstream. Other rates and speeds are available for the commercial and industrial users.

LOOKING AHEAD

j. DC NET: Building an Independent and Secure Network

In **Washington, D.C.**, driven by the inability to access certain City agencies during the height of September 11 crisis, the hope of saving District taxpayers a minimum of $10 million per year and the dream of having a coordinated public safety and transportation

network, Deputy Mayor John Koskinen is spearheading an effort to create an independent City-owned telecommunications network--DC NET.

DC NET will have as its backbone the INET which the city negotiated in its cable franchise renewal. This fiber-optic infrastructure will be one of the largest of its kind in the nation, linking well over 300 District buildings. While the City has about $47 million in funding for the project, it still needs an additional $40 million to be fully capitalized.

DC Net will also be "self-healing," meaning that any interruptions or breaks in the network will be rerouted within 50 microseconds. DC Net will work in support of the City's wireless voice and data system, including "push-to-talk" public safety radios. The network will tie together the radio communication infrastructure for the police department, as well as fire and emergency medical services. When completed, DC Net will also work as a "backbone" for the District's integrated transportation management system, which will link together more than 1,600 signalized intersections. Because of the increased bandwidth capacity, the District anticipates better data from its intersections and ultimately better management of signals.

k. Horizontal Directional Drilling (HDD) Handbook

The **City of Overland Park, Kansas** has developed a publication titled "Horizontal Directional Drilling Guidelines Handbook. The handbook is intended to be used as a basic guide for Horizontal Directional Drilling (HDD) applications performed within the City. The overall purpose is to provide guidelines that will help ensure public safety and protection of existing underground facilities.[44]

l. DUCT BANK

The **Town of Westlake, Texas** established a duct-bank system for utilities planning and development. Westlake had the fortune of being mostly undeveloped with a few business regional headquarters. The "spine" is constructed with 1/3 Town finances, and 1/3 paid by each developer on either side of the thoroughfare. Residential duct bank is built and paid for by the developer and then the Town reimburses the cost. Constructing duct bank is a condition of receiving a plat. The Town also configured water meters to use cable in the future, and would be capable of monitoring real-time water use. A utility is not required to use the duct bank; it may instead use space in an easement.[45]

CONCLUSION

As mentioned in the paper's introduction, local government officials want, need, and promote the universal availability of broadband infrastructure and the advanced services that such a network can support. NATOA hopes that the list of illustrative examples, presented in this paper, show how local governments have promoted broadband deployment and the availability of advanced telecommunications services within their communities, and provides a greater understanding of the communities' abilities to shape solutions to meet the needs of their residents.

[44] You can access the document at; http://www.opkansas.org/Documents_&_Forms/hdd_guidelines.pdf.

[45] For more information visit the Town of Westlake web site at http://www.westlake-tx.org.

Exhibit 2 – Excerpt from a *Local Officials Guide to Telecommunications and Rights of Way*

LOCAL OFFICIALS GUIDE

Telecommunications and Rights-of-Way

National League of Cities

NACO National Association of Counties
Counties Care for America

The United States Conference of Mayors

IMLA

natoa

ISBN 1-886152-87-X

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Exhibit 3 - Dissent of Commissioner Loretta Lynch

Resolution on Access to Public Rights of Way and Public Lands
2002 NARUC Summer Meeting, Portland, Oregon

Dissent of Loretta Lynch, President, California Public Utilities Commission

I dissent from the rights of way resolution for both procedural and substantive reasons. First, I have serious concerns about the insufficient period of time that NARUC members were provided to review the report addressed by this Resolution. The report was first presented as a draft with a final version to be rewritten during our conference. As of Tuesday morning, the report was still not available. The committee members were given one hour to review a 187-page report before a vote was taken. No redlined version was made available. I simply do not believe that adequate review was possible before a final vote was taken.

Substantively, I take serious issue with this body opining that a particular statutory approach is a model -- especially when 32 states have statutes that are different from the espoused model. California has statutes which differ from the supposed model which are working in practice. I object to this body supporting one model, which differs from and does not do justice to other states' valid choices. Further, I am concerned about the allegations of lack of sufficient consideration of the positions and concerns of the cities. Many cities wrote to me about concerns which they had worked out with carriers in a cooperative and practical manner, achieving consensus solutions to these complex issues. I am concerned that such working partnerships have been given short shrift in the report that was voted upon with an hour's review today.

Loretta M. Lynch

LORETTA M. LYNCH
President, CPUC
July 30, 2001

Exhibit 4 – Letter from National Associations to NARUC Leadership

Mr. William M. Nugent
Chair of the Board and President
NARUC
Maine Public Utilities Commission
242 State Street
18 State House Station
Augusta, Maine 04333-0018

Ms. Joan H. Smith
Chair, Committee on Telecom
NARUC
State of Oregon
Public Utility Commission
550 Capitol Street N.E. Suite 215
Salem, Oregon 97301-2551

July 24, 2002

Dear Commissioner Nugent and Commissioner Smith:

The National Association of Telecommunications Officers and Advisors (NATOA), the National League of Cities (NLC), the National Association of Counties (NACo) and the United States Conference of Mayors (USCM) represent local governments nationwide. Our organizations share the National Association of Regulatory Utility Commissioners' commitment to telecommunications competition and consumer choice. We write, however, to express our extreme disappointment in both the process and product of the NARUC Public Rights-Of-Way Study Committee.

As you know, at the Winter NARUC meetings, the Telecommunications Committee adopted a resolution creating the Public Rights-of-Way Study Committee to "develop recommendations for reducing the extent to which rights-of-way access serves as a barrier to the deployment of advanced telecommunications and broadband networks…." At that time, and repeatedly since, we have objected to the content of this resolution because we believe it inaccurate. Our initial and continuing concern over the language of the resolution is its assertion, without any factual analysis, that local governments are an impediment to broadband deployment. The assertion was and continues to be made by industry representatives in a massive lobbying campaign based on industry desires and not fact.

The Study Committee's leadership has continued this process of developing policy based on allegations and not facts. They have permitted the industry to present information, without requiring any actual data or facts. We have taken great pains to point out to the Study Committee the inappropriateness of relying on assertions, and the failure of the committee to require evidence in support of these assertions. To date these efforts have been for naught and have gone unheeded.

Further, local government sought to participate at both the staff and membership level in the NARUC process. Despite our willingness to participate, it became very clear that the Study Committee leaders, on at least two sub-committees, had decided to use this forum to support their own agendas, and not as a reflection of the state of deployment throughout the United States.

The pre-ordained determination that it is local government, not demand (or some other difficulty such as lack of capital), that is the barrier to broadband deployment is the genesis of the problem. In fact, NCTA reports that more than 70 million homes are passed by broadband service and NCTA has indicated that more than 90 million homes will be passed by the end of 2002. Throughout the NARUC Study Committee process, it has been, and continues to be industry's sole focus to deny local governments their rights regarding the management authority and ability to receive compensation for occupation of the public rights-of-way. A reflection of this determined result is seen in the more than eighty (80) page commentary submitted by the National Association of Telecommunications Officers and Advisors, only to have every suggestion rejected.

After months of assessment and analysis, much of which we believe could be very beneficial to the overall education of all interested parties, the Study Committee has failed to fully assess the problems relating to broadband deployment, but rather has simply relied on concepts to propose a piece of model legislation largely based on the Michigan legislation (while borrowing some pieces from other states). Rather than the proposed legislation, we believe that the Study Committee had a great opportunity to assess the success of state legislation that has already been passed to see whether these laws do in fact have a beneficial effect on broadband deployment. Further, the Study Group's white paper relies heavily on the Michigan legislation, and fails to fully discuss the other state legislation choosing instead to simply provide statutory references.

While we take exception to numerous issues, our key issue is the position of one of the four sub-committees of the Study Committee that occupation of the public rights-of-way should be for free. The Condemnation Subcommittee made clear that this is a takings issue. Other sub-committee groups of the Study Committee have recognized and acknowledged the property interests of local government in the public rights-of-way and the right to be compensated for use of those property interests. Despite this, the model legislation offered in the White Paper states: "<u>The fees assessed to a provider may not include any payment for rent or other compensation for the economic value of the property rights used within the rights-of-way.</u>" Free access was not contemplated by the Congress in passage of Section 253 of the Telecommunications Act, which provides for "fair and reasonable compensation." Also, the vast majority of the individual state legislatures have not taken this position. For the work product of the Committee to be a fair representation of the debate, it is only fair that an alternative proposal in the model statute provide language for the recovery of an occupation or rental fee. Local government has offered a proposal and seeks support for its inclusion as an option for consideration by individual state legislatures.

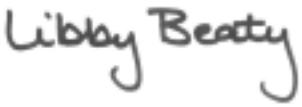
We are further distressed that NARUC members would seriously consider proposing preemption of local government in light of NARUC's long-standing policy to NEVER seek preemption of any state action by the federal government. We believe that Congress' instructions, relating to Section 253 of the Telecommunications Act, make clear that the federal government has no role in the setting of rates for public rights-of-way and believe that it would negate the Commissioners own state or local laws to request or support such preemption.

We have attached a redline of the current resolution with requested modifications for your consideration during the upcoming summer meeting. We are also making available our comments on the Study Committee's White Paper and proposed model legislation. Please call or e-mail Libby Beaty (lbeaty@natoa.org (703) 506-3275) or Juan Otero (otero@nlc.org (202) 626-3022) for a copy of these documents. The documents may also be reviewed on-line at www.natoa.org.

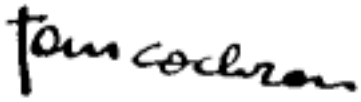
We strongly urge NARUC's leadership to address these concerns in a timely manner so that in partnership with local government, taxpayers rights in the public rights-of-way will be protected and the ability of consumers to access broadband will be achieved. We fear that if the current proposal is adopted as offered, it will severely damage the state-local partnership many of us have worked so hard to develop.

We look forward to hearing from you at your earliest convenience.

Sincerely,



Libby Beaty
Executive Director
National Association of Telecommunications Officers and Advisors



J. Thomas Cochran
Executive Director
U.S. Conference of Mayors

Don Borut
Executive Director
National League of Cities

Larry Naake
Executive Director
National Association of Counties

cc: David Svanda, First Vice President, NARUC
Stan Wise, Second Vice President, NARUC
Constance White, Treasurer, NARUC
Charles Gray, Executive Director, NARUC
James Bradford Ramsay, General Counsel, NARUC
Robert Nelson, Co-Vice Chair, Committee on Telecom
Thomas Dunleavy, Co-Vice Chair, Committee on Telecom
Committee on Telecom Members
NATOA, NLC, NACo, USCM Boards and Members

Exhibit 5 – NATOA Comments to NTIA

Before the
UNITED STATES DEPARTMENT OF COMMERCE
National Telecommunications and Information Administration
Washington, D.C. 20230

In the Matter of	)	
Request for Comments on Deployment of Broadband Networks and Advanced Telecommunications	)	Docket No. 011109273-1273-01
	)	RIN 0660-XX13

INITIAL COMMENTS OF THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS ("NATOA") AND THE TEXAS COALITION OF CITIES FOR UTILITY ISSUES ("TCCFUI")

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Counsel for the National Association of Telecommunications Officers and Advisors ("NATOA") and the Texas Coalition of Cities for Utility Issues ("TCCFUI")

December 19, 2001

SUMMARY

NATOA and TCCFUI respond to three elements of specific questions posed by NTIA. The following comments address: (a) the appropriate federal-state-local relationship necessary to foster broadband development; (b) the role of public rights-of-way as one of the market characteristics necessary to induce competitors to make facilities-based investments; and (c) the impact of local government right-of-way management regulatory policies on current broadband deployment rates.[1] In particular, NATOA and TCCFUI herein discuss the impact of broadband deployment on: the legal authority and fiduciary duty of state and local governments to recover fair value for private use of publicly-owned property; and present evidence that local franchising and rights-of-way compensation authority has not affected broadband deployment rates.

It is time for NTIA to bring to rest a persistent misunderstanding arising in the wake of the Telecommunications Act of 1996. NTIA should state that local governments do not stand in the way of competition and deployment of broadband facilities. Our citizens are hungry for residential broadband deployment. Local governments are seeking facilities-based competition to address this need. Efficient, fair management and pricing of public rights-of-way is essential to a predictable, vigorous broadband market. Public rights-of-way should be neither a source of subsidy nor a barrier to advanced networks. Local governments take seriously their duty to steward scarce public resources and to provide competitive access to local markets without damaging innocent third parties.

[1] NTIA Request for Comments on Deployment of Broadband Networks and Advanced Telecommunications Services, Questions L, G and C.

Any national broadband policy must recognize the rights of local governments under the Telecommunications Act of 1996 ("1996 Act"). The U.S. Constitution protects local governments' property rights in public rights-of-way. It also protects the federal form of government, reserving to states and local governments all powers not delegated to the United States, including all authority to manage use and disruption of local public rights-of-way.

The Telecommunications Act of 1996 Was Drafted to Balance the Interests of Federal, State, and Local Governments, and to Protect Local Management of Public Rights-of-Way. The 1996 Act recognized the rights of local governments to control and manage their rights-of-way and to obtain fair compensation for right-of-way use. In the 1996 Act, Congress sought to promote the entry of multiple, competing telecommunications providers, without transgressing the rights and responsibilities of state and local governments, through the language developed in section 253 of the 1996 Act. The legislative history shows that Congress inserted § 253(c) specifically to preserve local authority over reasonable rights-of-way compensation and management, and drafted § 253(d) to ensure that the courts, and not federal agencies, have jurisdiction over § 253(c) issues.

Right-of-Way Management By Local Governments Is Necessary to Balance the Competing Demands Placed Upon Local Rights-of-Way. Local communities work with telecommunications providers and other rights-of-way users to resolve problems and make rights-of-way work efficient. When telecommunications providers refuse to cooperate, or ignore legitimate requirements, people get hurt and physical assets are damaged. Too often, providers fail to abide by local government standards of right-of-way management. Too often providers seek shelter before the FCC. Many examples prove that local governments are the place to coordinate local right-of-way use. However, these efforts require local government

resources, and the cost of these resources must be recovered – not only the costs of administration and repair, but also those of acquisition and maintenance.

Reasonable Right-of-Way Compensation is Not a Barrier to Entry. Limiting local government right-of-way compensation to less than market value does not recognize the scarce and valuable nature of public-rights-of-way. Compensation should assure that the right-of-way is dedicated to its highest and best use and avoid wasteful consumption of this precious resource. The federal government spectrum auction policies are directly analogous: spectrum, like right-of-way space, is a scarce resource that is most efficiently allocated through a market price mechanism. It is inconsistent for the federal government to auction spectrum at the highest possible price while at the same time asserting that local government property should be given away to telecommunications companies at below market compensation. Local governments must be free to seek appropriate efficient pricing mechanisms, including revenue-based measures, to establish such compensation.

There Is No Evidence to Suggest That Local Governments' Current Right-of-Way Policies Have Impeded the Entry of Competitive Providers Into the Market. Telecommunications providers are pursuing entry strategies based on market factors, not local right-of-way policies and regulations. The primary factor driving broadband deployment is access to capital financing. Broadband deployment has tended to focus on highly urbanized Central Business Districts because the density and affluence of those areas offer higher return on invested capital. Broadband facilities are being built wherever the returns and capital are adequate – including communities where local governments charge reasonable compensation and regulate their public rights-of-way. New networks are not being built wherever there is

inadequate returns on invested capital. And this includes most communities around the nation, even those offering rights-of-way for free and without any regulation requirements.

Restricting Local Authority Does Not Increase Broadband Deployment Rates. All available evidence suggests that restricting or preempting local government authority over public rights-of-way does nothing to change the rate of deployment of advanced services. As an example, Texas municipalities were broadly preempted by Texas HB 1777. However, these restrictions on local government rights-of-way authority have not led to any change in deployment of advanced services to Texans. HB 1777 is evidence that local government regulation is not the cause of delays in broadband deployment.

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UNITED STATES DEPARTMENT OF COMMERCE
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INITIAL COMMENTS OF THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS ("NATOA") AND THE TEXAS COALITION OF CITIES FOR UTILITY ISSUES ("TCCFUI")

I. Introduction

The National Association of Telecommunications Officers and Advisors (NATOA) is a national association that represents the telecommunications needs and interests of local governments, and those who advise local governments. The membership is predominately composed of local government agencies, local government staff and public officials, as well as consultants, attorneys, and engineers who consult local governments on their telecommunications needs.[2]

[2] Government members have responsibilities that range from cable telecommunications administration, franchising, rights-of-way management programming governmental channels on cable television systems, information technologies and E-Government planning and management. There are also members from not-for-profit organizations whose needs and interests are complementary to those of NATOA's government members. Finally NATOA

The Texas Coalition of Cities for Utility Issues ("TCCFUI") is a coalition of more than 110 Texas Cities dedicated to protecting and supporting the interests of the Citizens and Cities of Texas. TCCFUI monitors the activities of the Texas Legislature, Public Utility Commission, Rail Road Commission and the Federal Communications Commission. TCCFUI also provides franchising expertise and model franchise documents to member cities, and ensures that the citizens of Texas continue to enjoy quality utility and cable service.[3]

NATOA and TCCFUI respond to three elements of specific questions posed by NTIA. The following comments address: (a) the appropriate federal-state-local relationship necessary to foster broadband development; (b) the role of public rights-of-way as one of the market characteristics necessary to induce competitors to make facilities-based investments; and (c) the impact of local government right-of-way management regulatory policies on current broadband deployment rates.[4] In particular, NATOA and TCCFUI herein discuss the impact of broadband deployment on: the legal authority and fiduciary duty of state and local governments to recover

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includes in its membership vendors to local governments, including telecommunications providers of all types of services. For more information visit http://www.natoa.org

[3] The members of TCCFUI include the following Texas cities: Abernathy, Addison, Alamo, Allen, Andrews, Arlington, Austin, Balcones Heights, Belton, Big Spring, Bowie, Breckenridge, Brenham, Brookside Village, Brownfield, Brownwood, Buffalo, Burkburnett, Canyon, Carrollton, Cedar Hill, Center, Cisco, City of Ralls, City of Timpson, Clear Lake Shores, Cleburne, College Station, Conroe, Corpus Christi, Cottonwood Shores, Crockett, Dallas, Denison, Denton, Dickinson, El Lago, Electra, Fairview, Flower Mound, Fort Worth, Fredericksburg, Friendswood, Georgetown, Grand Prairie, Grapevine, Greenville, Gregory, Groves, Harlingen, Henrietta, Hewitt, Huntsville, Irving, Jacinto City, Jamaica Beach, Kilgore, La Grange, La Joya, Lampasas, Lancaster, Laredo, League City, Levelland, Lewisville, Longview, Los Fresnos, McAllen, Mexia, Midlothian, Missouri City, Navasota, Nolanville, North Richland Hills, Palacios, Pampa, Paris, Pearsall, Plainview, Plano, Port Neches, Ralls, Refugio, Reno, Richardson, River Oaks, Rosenberg, San Marcos, San Saba, Selma, Seminole, Seymour, Smithville, Snyder, South Padre Island, Spearman, Stephenville, Sugar Land, Sunset Valley, Taylor Lake Village, Terrell, The Colony, Thompsons, Timpson, Town of Westlake, Trophy Club, Tyler, University Park, Victoria, Waxahachie, and Webster.

[4] NTIA Request for Comments on Deployment of Broadband Networks and Advanced Telecommunications Services, Questions L, G and C.

fair value for private use of publicly-owned property; and present evidence that local franchising and right-of-way compensation authority has not affected broadband deployment rates.

The Communications Act of 1934, as amended by Congress in 1996[5], establishes a system of shared regulatory authority between the states and the federal government. The Federal Communications Commission ("FCC" or "Commission") regulates "interstate communication by wire and radio,"[6] subject to the acknowledged authority of local and state governments over public rights-of-way. However, the FCC's jurisdiction over interstate communications itself has limits. For example, the FCC may not broadly preempt federal, state or local health and safety regulations, zoning regulations, and Equal Employment Opportunity requirements. The states (and local governments pursuant to delegated state authority) regulate "intrastate communications by wire and radio."[7] Local governments and the FCC each have a measure of independent authority, but also share certain regulatory jurisdiction over cable television franchise requirements related to "facilities and equipment,"[8] and cable television consumer protection.[9] For example, the FCC has authority to establish minimum cable television customer service standards, but each state and each locality has the authority to establish more rigorous requirements, and the FCC is not authorized to intrude upon that authority. In sum, where Congress has granted federal agencies regulatory authority, Congress has also reserved discrete authority for state and local governments.

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[5] 47 U.S.C. § 151 et seq.

[6] 47 U.S.C. § 151(a).

[7] ". . .(S)ubject to the provisions of section 301 and Title VI of this chapter, nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier." . . 47 U.S.C. § 152(b).

[8] 47 U.S.C. § 544(a).

Federal agencies should acknowledge that federal law assigns local governments responsibility for protecting and stewarding their most valuable real estate asset — the public right-of-way. Local authority assures that multiple, conflicting uses of public rights-of-way does not thwart the public purposes to which it is dedicated. In this context, local governments currently manage public rights-of-way to encourage market entry and competition. Local governments are committed to the following regulatory principles:

1. Encourage rapid deployment of advanced networks which enhance the welfare of our citizens and the economic development of our communities;
2. Ensure advanced network providers address local community needs and interests;
3. Protect consumers from unfair and unreasonable business practices;
4. Encourage the development of meaningful telecommunications competition; and
5. Ensure that the private, for-profit use of public property is efficiently and effectively managed, fully compensated, and consistent with the dedication of public rights-of-way to serve the public interest.

NATOA and TCCFUI dispute suggestions by telecommunications companies (made in numerous filings before the FCC) that further preemption or restriction of local government right-of-way authority will speed deployment of advanced services. All available evidence suggests that restricting or preempting local government authority to manage and require compensation for use and occupation of the public rights-of-way does nothing to accelerate the rate of deployment of advanced services. Preempting local authority does, on the other hand, increase costs to all persons dependent on using rights-of-way. When telecommunications providers do not pay their fair share, local governments and their taxpayers must foot the bill.

All available evidence demonstrates that effective right-of-way management and compensation speeds development of overbuild telecommunications facilities. Preemption of

[9] 47 U.S.C. § 552.

this local authority has the opposite effect. Many of the local government restrictions suggested by industry are now imposed on Texas municipalities by Texas HB 1777. These restrictions on local government right-of-way authority have not accelerated deployment of advanced services to Texans. The implementation of HB 1777 has harmed Texas taxpayers and all right-of-way users. HB 1777 proves local government regulation is not the cause of delays in telecommunications network deployment. Advanced services remain unavailable to the majority of Texans – regardless of whether they live in urban areas, affluent suburbs, rural areas, or economically depressed or disadvantaged areas. Advanced services are deployed only to large commercial buildings in Texas that are more profitable to service than residential and small business subscribers. Deployment of advanced services is most influenced by the single factor of capital availability – access to capital and return on investment. When capital was available to the telecommunications markets, deployment rates in Texas and elsewhere increased. When access to capital became limited, deployment stopped. This was not caused by HB 1777's preemption of local authority. HB 1777 did not improve the deployment rates in Texas, and there is no evidence that such a preemption on a national level would improve deployment rates anywhere in America.

II. THE TELECOMMUNICATIONS ACT OF 1996 PROTECTS LOCAL AUTHORITY TO MANAGE AND REQUIRE COMPENSATION FOR USE OF THE PUBLIC RIGHTS-OF-WAY TO DEPLOY BROADBAND FACILITIES.

The Telecommunications Act of 1996 ("1996 Act") sought to promote the entry of multiple, competing telecommunications and advanced services providers, without transgressing the rights and responsibilities of state and local governments. Congress explicitly resolved these two goals in the final text of 47 U.S.C. § 253 (Removal of Barriers to Entry).

NTIA's ultimate broadband recommendations will impact the use and occupation of local public rights-of-way to deploy broadband facilities. Therefore, an accurate analysis of § 253 is crucial to any NTIA action on broadband deployment.

47. U.S.C. § 253 states:

> (a) IN GENERAL. -- No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.
>
> (b) STATE REGULATORY AUTHORITY. -- Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.
>
> (c) STATE AND LOCAL GOVERNMENT AUTHORITY. -- Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.
>
> (d) PREEMPTION. -- If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correction such violation or inconsistency. . . .

First, it is useful to briefly summarize the proper interpretation of the various subsections of § 253. **Subsection (a)** is a general prohibition against state and local regulations that have the effect of prohibiting the provision of telecommunications service. **Subsection (b)** is a safe harbor that protects traditional state consumer participation regulations, including universal service. **Subsection (c)** is a safe harbor that protects state and local right-of-way management and compensation authority. Finally, **subsection (d)** gives the FCC jurisdiction to determine

whether state or local regulations violate subsection (a), or fall within the state safe harbor of subsection (b). As discussed below, if the FCC were to determine that a state or local regulation actually had the effect of prohibiting the provision of telecommunications service in violation of subsection (a), it would be for a federal court – not a federal agency – to determine whether such state or local regulation is nonetheless permissible because it falls within the safe harbor of right-of-way management and compensation.

Congress delegated to the courts – and thus took away from federal agencies – the power to interpret what are fair and reasonable right-of-way management and compensation regulations. Section 253 dismisses federal agency jurisdiction to take actions (even to promote competitive networks) that infringe upon local property rights in the public rights-of-way.[10]

A. Preemption of State and Local Regulations Is Not Permissible Unless Such Regulations Have the Effect of Prohibiting the Provision of Telecommunications Service.

As a threshold matter, under § 253(a), state and local right-of-way management regulations may not be preempted by the FCC unless the agency determines that the state and local requirements "prohibit or have the effect of prohibiting the ability of any entity to provide" telecommunications service.

In one of the seminal cases analyzing § 253, the FCC itself recognized that there must be a prohibition before there can be a violation of § 253:

> [I]t is up to those seeking preemption to demonstrate to the Commission that the challenged ordinance or legal requirement prohibits or has the effect of prohibiting potential providers' ability to provide an interstate or intrastate

[10] Attachment A, *see generally*, *Cablevision of Boston, Inc. v. Public Improvement Comm'n*, 184 F.3d 88 (1st Cir. 1999); *BellSouth Telecommunications, Inc. v. Town of Palm Beach*, 252 F.3d 1169 (11th Cir. 2001).

> telecommunications service under section 253(a). Parties seeking preemption of a local legal requirement . . . must supply us with credible and probative evidence that the challenged requirement falls within the proscription of section 253(a) without meeting the requirements of section 253(b) and/or (c).[11]

Most recently, the Eleventh Circuit interpreted § 253 and applied the same construction:

> [I]t is clear that (b) and (c) are exceptions to (a), rather than separate limitations on state and local authority in addition to those in (a). Consistent with this interpretation, if a party seeking preemption fails to make the threshold showing that a state or local statute or ordinance violates (a) because it "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service," the FCC has found it unnecessary to consider whether the statute or ordinance is "saved" by the exceptions in (b) or (c).[12]

B. Section 253(d) Precludes Federal Agencies From Addressing Issues Regarding Local Right-Of-Way Compensation Or Management.

In the event that credible evidence is presented to demonstrate that a state or local regulation has the effect of prohibiting the provision of telecommunications service, under § 253(d) the FCC lacks authority to consider whether state or local right-of-way compensation or management are nonetheless permissible regulations under the safe harbor of § 253(c). Congress intended these questions to be left to the courts. Subsection (d) gives the Commission authority to resolve only subsection (a) and (b) disputes, and *withholds* from the Commission authority over subsection (c) disputes. Federal agencies lack authority to determine whether compensation charged by a municipality is "fair and reasonable" or whether

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[11] Attachment B, *In the Matter of TCI Cablevision of Oakland County*, 12 FCC Rcd. 21,396 at ¶ 101, *aff'd* FCC Rcd. 16,400 (1998) (emphasis added).

[12] *Town of Palm Beach*, 252 F.3d at 1188 (emphasis added) *citing* [Attachment B] *In re Missouri Municipal League*, 16 FCC Rcd. 1157, 2001 WL 28068 (2001); *In re Minnesota*, 14 FCC Rcd. 21,697, 21,730 (1999); *In re American Communications Servs., Inc.*, 14 FCC Rcd. 21,579, 21,587-88 (1999); *In re Cal. Payphone Ass'n*, 12 FCC Rcd. 14,191, 14,203 (1997).

right-of-way management or compensation requirements are exercised on a "competitively neutral and nondiscriminatory basis." Such questions are for the courts to resolve. Any NTIA policy regarding broadband deployment must recognize Congress withheld from federal regulations the jurisdiction to intrude on the rights of sovereign state and local governments on matters of rights-of-way management and compensation.

Subsection 253(d), the preemption provision, was added in Conference, based on Section 254 of the Senate Bill.[13] In the Senate, § 254(d), as originally proposed and numbered, contained a sweeping preemption provision that did not exclude subsection (c) from its coverage. After a proposed amendment to remove the preemption provision in subsection (d) entirely, and after substantial debate on the Senate floor, a compromise amendment, offered by Senator Gorton (R-WA), was adopted to preserve state and local authority over management of and compensation for the public rights-of-way. The Gorton Amendment, adopted by unanimous voice vote, revised subsection (d) to clarify that subsection (c) (rights-of-way management and compensation issues) would not be subject to FCC preemption authority under subsection (d).

Senator Gorton, the author of the successful compromise amendment, stated:

> There is *no* preemption . . . for subsection (c) which is entitled, "Local Government Authority," and which preserves to local governments control over their public right of way. It accepts the proposition from [Senators Feinstein and Kempthorne] that these local powers should be retained locally, that <u>any challenge to them take place in the Federal district court in that locality and that the Federal Communications Commission not be able to preempt such actions</u>.[14]

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[13] The House provision did not contain any preemption provision at all. H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 126-27 (1996). Thus, the history of the provision must be found in the Senate bill, S. 652, rather than in the House.

[14] 141 Cong. Rec. S 8213 (Daily Ed. July 13, 1995) (remarks of Sen. Gorton) (emphasis added).

The intent of Congress to reject any implied FCC preemptive authority over local and state governments is also explicit:

> The conference agreement adopts the House provision [under Section 601] stating that the bill does not have any effect on any other Federal, State, or local law unless the bill expressly so provides. This provision prevents affected parties from asserting that the bill impliedly preempts other laws.[15]

Section 601(c)(1) states:

> NO IMPLIED EFFECT. –This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.[16]

In sum, under the 1996 Act, the federal agency responsible for implementing the Act has no implied authority, its delegated authority is limited, and does not extend to the authority to review state and local government management and compensation decisions affecting public rights-of-way.

C. Congress Preserved Local Authority to Impose Reasonable Compensation and Management Requirements.

Section 253(c) specifically preserves local authority over reasonable right-of-way compensation and management. Both the language of 253(c) and the intent of Congress are explicit and unambiguous. The Senate bill which eventually became the 1996 Act was introduced without any safe harbor for local governments. The Senate Commerce Committee added subsection (c) in much its present form to the Senate bill as originally introduced. The Committee intended to provide a safe harbor for local governments.

The House took similar action to preserve local authority over public rights-of-way. The corresponding bill introduced in the House explicitly preempted local right-of-way

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[15] H.R. Conf. Rep. No. 458, 104th Cong., 2d. Sess., 201 (1996).

[16] Telecommunications Act of 1996, 47 U.S.C. § 601(c)(1).

compensation. While it included a safe harbor provision for state consumer regulation, analogous to the Senate's version,[17] it also contained a preemption requiring "parity" of franchise fees and other local charges between incumbent local exchange carriers (ILECs) and competitive local exchange carriers (CLECs). This parity provision was cast in the form of a prohibition ("no local government may impose or collect…"). These two provisions were generally referred to as the "MFS amendment," because that company had successfully sought inclusion of similar language in H.R. 4103, a predecessor bill in the 103d Congress.

In the House hearings, local government witnesses testified in opposition to the MFS amendment. Negotiations between Representatives favoring the local government position and Representatives favoring the MFS position failed to resolve how the House bill should treat right-of-way issues.[18] The debate then moved to the floor of the House. After debate, the House adopted the Barton-Stupak amendment by the overwhelming vote of 338-86.[19] The Barton-Stupak amendment struck the entire Committee proposal to preempt local governments, including the MFS amendment, and substituted new language essentially the same as that added by the Senate Committee, with three exceptions not directly material here. Speaking in support of the Barton-Stupak amendment, Representative Barton stated:

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[17] *Id.*

[18] Representatives Schaefer (R-Colo.), the leading proponent of the MFS amendment met with Representative Barton (R-Texas), and Representative Stupak (D. Mich). In these negotiations the parties failed to reach agreement on whether to replace bill language that, in the words of the Committee's Report on H.R. 1555, H. Rpt. 104-204, would prohibit activity that "discriminates among providers of telecommunications services (including the LEC)." *Id.* at 75.

[19] 141. Cong. Rec. H 8477 (daily ed. Aug.. 4, 1995). The Barton-Stupak amendment was adopted despite Representative Schaefer's objection that the amendment "is going to allow the local governments to slow down and even derail the movement to level competition." *Id.* at H 8460-61. In other words, in enacting the Barton-Stupak amendment, Congress considered specifically whether to allow preemption if local governments were slowing down competition – which they are not – and *rejected* preemption even in that unlikely case.

> [The amendment] explicitly guarantees that cities and local governments have the right not only to control access within their city limits, but also to set the compensation level for the use of that right-of-way.… The Chairman's amendment has tried to address this problem. It goes part of the way, but not the entire way. The Federal Government has absolutely no business telling State and local government how to price access to their right-of-way.[20]

Despite the overwhelming House vote in favor of the Barton-Stupak amendment and rejecting Mr. Schaefer's position, as well as the unanimous adoption of the Gorton amendment on the Senate floor, the debate over local right-of-way management and compensation language continued into the conference committee. Mr. Schafer was a member of the Conference Committee and attempted once again to revisit preemption of local right-of-way authority. The final conference agreement on the bills as adopted by both houses, however, adopted the Senate language of § 253. The final law thus preserves the safe harbor protecting the authority of local governments over right-of-way management and compensation.

Section 253(c) begins "Nothing in this section affects.…" Congress chose this language to mirror Section 2(b) of the 1934 Act, 47 U.S.C. § 153(b) ("Nothing in this act shall … apply …").[21] Congress was well aware that the Supreme Court had held that language to be an overarching denial of jurisdiction to the Commission in *Louisiana PSC v. FCC*, 476 U.S. 355, 370, 374 (1986) (the language "fences off" this area from FCC jurisdiction).[22]

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[20] *Id.* at H 8460.

[21] This is the same section 2(b) that the drafters of Section 243(e) of H.R. 1555 (part of the "MFS amendment") had thought necessary to expressly override in their 1995 attempt to give the Commission jurisdiction over such matters.

[22] Attachment A, *see also Iowa Utilities Board v. FCC*, 120 F.3d 753, 800 (8th Cir. 1997), *cert. granted*, 118 S.Ct. 879 (1998) ("a fence that is hog tight, horse high, and bull strong").

D. Under Federal Law, Compensation for Use and Occupation of Public Rights-of-Way Is Not Limited to Cost.

Nothing in Section 253(c) suggests that public compensation for private use of public rights-of-way is limited to cost. Congress spoke of "compensation … for use" rather than reimbursement of costs. The debate on the Barton-Stupak Amendment on the House floor explicitly ratified franchise fees measured by the traditional percentage of gross receipts – analogous to the percentage franchise fee for cable television operators, embodied in Section 622 (Franchise Fees) of the Cable Act of 1984. [23]

If Congress had intended to limit local government to recovery of its costs, it would have used language to that effect rather than using the term "compensation," which as one federal court recently stated, "has long been understood to allow local governments to charge rental fees for public property appropriated to private commercial uses."[24] The United States Supreme Court held early on that a franchise fee could properly be based on the value of the franchise and that whether the municipal fee was excessive or not could not be determined from the face of the franchise.[25]

E. Compensation For Use of the Public Rights-of-Way May Be In the Form of Gross Revenues.

A gross revenues fee is a fair and reasonable method of approximating use of public rights-of-way. A percentage of a telecommunications provider's gross revenues is a measure of use that is roughly proportional to the intensity of the provider's use of the public rights-of-way. Use is not limited to permanent physical occupancy. Transiting a public right-of-way is

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[23] 47 U.S.C. § 542(b). 141 Cong. Rec. H8460-61 (daily ed. Aug. 4, 1995).

[24] Attachment A, *TCG v. White Plains,* 125 F. Supp. 2d 81, 96 (S.D.N.Y. 2000).

[25] Attachment A, *City of St. Louis v. Western Union Tel. Co.*, 148 U.S. 92, 104-105 (1893).

a use of that roadway. Consider that the telecommunications provider using facilities in a right-of-way is in the business of transporting bits of information over lines occupying the streets. As a first approximation the provider's charge to customers is proportional to the amount of information transported, *i.e.*, the number of bits. The amount of the carrier's transport is reflected in its revenues. Thus, to measure use of the rights-of-way by information transported for which the end-user pays is comfortably within the legislative discretion of local governments.

Furthermore, "calculating the impact or costs of telecommunications providers on the public rights-of-way would not be a simple undertaking."[26]

> ("A number of intangible factors would need to be considered, including the shortened life of pavement, added police costs to deal with traffic disruptions, interference with the City's other systems, impact on traffic, and offsetting benefits to the City from the availability of multiple telecommunications providers.")[27]

Given the difficulty of determining the costs to be associated with a particular company's use of the rights-of-way, a gross revenues fee offers the simplest and fairest way of setting compensation. Several courts have recognized these difficulties, and have upheld gross revenue-based compensation.[28]

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[26] *White Plains*, 125 F. Supp. at 96, n. 11.

[27] *Id.*

[28] Attachment A, *TCG Detroit v. City of Dearborn*, 206 F.3d 618 (6th Cir. 2000); *TCG v. White Plains*, 125 F. Supp. 2d 81; *Omnipoint Comm'ns, Inc. v. Port Authority of New York and New Jersey*, 1999 WL 494120 (S.D.N.Y. 1999); *BellSouth Telecommunications v. City of Orangeburg*, 522 S.E.2d 804, 808 (S.C. 1999) (finding "franchise fee equal to a percentage of the revenue generated is not inherently unfair or unreasonable…")

III. APPROPRIATE RIGHT-OF-WAY MANAGEMENT IS NOT A BARRIER TO ENTRY.

The various and often competing interests of the rights-of-way users must be coordinated and managed. Telecommunications providers, utilities and the traveling public have conflicting requirements. A right-of-way manager must take control if *any* of the parties are going to use the local public rights-of-way effectively. For this reason alone it is imperative that an entity coordinate these uses of the local rights-of-way, taking into account the needs of the local community. Local governments are the only practical level of government that balance these interests and preserve the local rights of way for future use.

A. Right-Of-Way Management Is Necessary To Balance the Competing Demands Placed Upon Local Rights-of-Way.

Since the passage of the 1996 Act, the number of companies seeking to offer telecommunications services has exploded. Since 2000, the number of these providers that have postponed or eliminated scheduled broadband facility deployment or gone into bankruptcy has increased exponentially.[29] While not every provider will seek to enter every market at the same time, local communities are increasingly finding themselves faced with a myriad of telecommunications providers seeking access to or abandoning facilities in their public rights-of-way — property often under intensive use by other providers, utilities, and the traveling public. With each new user of the local rights-of-way comes, in addition to increased physical

[29] *See, e.g.*, Richard Waters, *CLECs Prepare for a Rough Ride in the Financial Markets: Competitive Local Exchange Carriers are Scrambling To Cut Spending as Investors and Lenders Become Skittish*, Financial Times (London), at 38 ("Most are now scrambling to cut spending and bring forward the point at which they can report a profit"); Lee Bergquist, *New Cable Company Pulling Plug; Digital Access Cites Inability to Raise Capital*, Milwaukee Journal Sentinel, Mar. 3, 2001, at 1D ("when financing is drying up for many companies that want to build cable systems in markets where there is existing cable operator."); Attachment C, Mavis Scanlon, *RCN: After the Fall*, Cable World, Jan. 1, 2001 ("The pull back in the capital markets 'definitely' is going to effect every overbuilder").

burdens on the local right-of-way, an increase in the possibility that a new user will interfere with and damage existing uses.

Appropriate right-of-way management is not a barrier to entry. Nor is there any substantial evidence in any federal regulatory or court proceeding to the contrary.[30] Local communities have worked with telecommunications providers and other right-of-way users to resolve problems and make right-of-way work more efficient. For example, the permitting process affords a community the opportunity to be aware of the various activities occurring in the public rights-of-way and to spot any potential conflicts.[31] Local governments may also be involved in arranging for common trenching or joint undergrounding of utilities and similar facilities when new developments are built or existing areas rebuilt.[32] Such construction- and

[30] Telecommunications providers have frequently approached the FCC with complaints that local right-of-way management is discouraging deployment. In this attack by anecdote, the industry commonly misstates the facts and never shows actual changes in deployment plans. Moreover, the industry's complaints are not about prohibitions but about local requirements that increase the cost of particular construction projects. Rights-of-way cannot be managed on a least-cost basis that endanger other users or and abutting landowners. There are hundreds of thousands of right-of-way construction permits granted annually by state and local governments. A problem rate of a tenth of one percent should generate a thousand or more complaints. The industry is unable to find even a hundred that it claims are a problem.

[31] Currently, nineteen states require persons who intend to dig to call a statewide coordination phone number, usually called "Miss Utility," to prevent accidental cuts of wires and pipelines. *See, e.g.*, Maryland Code Article 78, § 28A(c) (1991 Rep. Vol). Many localities require franchisees to comply with state "Miss Utility" regulations as part of their franchise permitting process. *See, e.g.*, Austin City Code § 18-8-17 (1998); Denver Municipal Code, § 10.5.2 (1999).

[32] Officials "hire consultants to devise plan to coordinate requests from companies that want to string wires or lay underground cables." Attachment C, Carri Karuhn, *Hoffman Drawing the Lines for Future; Town Out to Control Disruption of Cables*, Chicago Tribune, Oct. 9, 1997, at News 1. Attachment C, *see also* Cecilia M. Quick, *Mastering Telecommunications: Milpitas [California] Develops A Master Plan*, Government Finance Review, Feb. 1997, at 48; James W. Crawley, *The Dream is a Wonderland of Information and Entertainment. But for now, San Diego's Ambitious Rewiring in …IN THE TRENCHES*, San Diego Union-Tribune, May 29, 1994, at I-1.

restoration-related requirements are characteristic of right-of-way use agreements and telecommunications ordinances.

Reasonable right-of-way management does not prevent competitive entry. Indeed, it is essential to competitive entry, insofar as the local government must make sure that entrants do not interfere with other telecommunications providers or other right-of-way users. If each telecommunications provider were permitted to occupy the public rights-of-way in any manner it saw fit, some users would inevitably interfere with the use of others. The coordinating function of the local government is thus crucial to advancing competitive networks.[33]

B. Right-of-Way Management Is Necessary to protect the Public Health and Safety.

More directly harmful are those cases where failure of telecommunications providers (or other right-of-way users) to abide by sound standards of right-of-way management results in serious damage due to the use of the same physical space by multiple companies.[34] The following list are only one set of examples from the state of Texas:

- A contractor laying fiber optic cable for SWBT dug into a 2-inch diameter gas main in Harris County (outside Houston). The resulting explosion destroyed one home, badly damaged another, and forced evacuation of 25 other homes when gas

[33] As the Commission has stated, "Management of the rights-of-way is a traditional local government function. Local governments should be able to manage the rights-of-way in their usual fashion." Third Report and Order and Second Order on Reconsideration In the Matter of Open Video Systems, 11 FCC Rcd. 20,227 at ¶ 194, 197.

[34] In some urban areas the degree of crowding already causes significant problems for work in the right-of-way. For example, a sewer repair crew in San Francisco recently reported having to repair a three-by-five sewer pipe from *inside* the pipe because there was no other room left to work. Attachment C, Joanna Glasner, *High Bandwidth Bureaucracy*, Wired News, Mar. 25, 1999.

entered the sewer lines. Multiple fire crews were required. Damage was estimated at $600,000.[35]

- A contractor putting in a fiber-optic duct system drilled into a 33-inch diameter pressurized sewer line. The spill lasted 9 hours, sent 4.3 million gallons of sewage downstream creating the worst environmental spill in Plano (near Dallas) history. Twenty municipal workers worked through the night to repair the damage and sewage pump stations had to be shut down to repair the damage.[36]

- A construction crew installing fiber-optic cable in downtown Dallas hit a 32-inch diameter water main buried 32 feet beneath the street. The force of the water created a 50-foot gash in the sidewalks, and 20 million gallons of water flowed for four hours, flooding the basements of four buildings before the break could be contained. The flooding destroyed electrical boxes, motors that run air conditioning and pump water, elevators, carpeting and 30 to 40 cars. Eight hundred federal employees and residents of a 205-unit apartment building could not return to their offices or homes for several days.[37] If the incident had not occurred on a holiday, workers in basement offices could have been killed.

- A contractor installing underground conduit severed a SWBT telephone line, cutting off telephone service, including emergency 911 service for 3,600 Arlington, Texas (near Dallas) residents.[38] Surrounding merchants could not make credit card sales during the phone outage.[39]

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[35] Attachment C, S.K. Bardwell, *Gas Explosion Destroys Home, Forces Evacuation*, Houston Chronicle, Nov. 3, 2000, at A35.

[36] Attachment C, Wendy Hundley, *Plano Creek Cleaned After Sewage Spill*, Dallas Morning News, Oct. 14, 2000, at A37.

[37] Attachment C, Ian McCann & Steve Quinn, *Water Mains Flood Downtown*, Dallas Morning News, Sept. 5, 2000, at A1

[38] Attachment C, Rani Cher Monson & Melissa Borden, *3,600 Lose Emergency Phone Service*, Arlington Morning News, July 16, 1999, at A1.

[39] Attachment C, Jeff Prince, *Telephone Outage Jangles Commerce*, Star-Telegram, July 17, 1999, at A1.

- Over a two-week period, sub-contractors for Touch America cut through two water lines and three gas lines in Flower Mound, Texas. Forty people were evacuated, residents were without water for seven hours, flooding occurred for four hours, and traffic had to be diverted. Municipal utility crews worked through-out the night to repair damage.[40]
- A private contractor doing fiber optic work drilled into a 4-foot diameter water pipe shutting down one of Irving, Texas's (Dallas suburb) primary water mains.[41]
- Fiber optic installation contractors caused $204,440 worth of damage to Plano, Texas water and sewer facilitates between 1998 and 2001.[42]
- A SWBT contractor bored into an 8-inch diameter water main at Crowley Road and Westwood Drive in the City of Arlington, Texas, causing $41,284 in damages.[43]
- A Level 3 Communications contractor bored under West Street in the vicinity of the Union Pacific Railroad in the City of Arlington, Texas. Immediately after the boring began, West Street began to shift and crack due to the boring operations. The City was required to expend $84,957 to repair the damage to West Street.[44]

The list of Texas incidents is duplicated in every state of the Union. These right-of-way accidents will be reduced only if local governments have adequate regulatory authority to: properly manage the public rights-of-way; to impose construction and control and coordination requirements; to enforce inspections and penalties for safety violations; to evaluate the

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[40] Attachment C, Jason Lamers, *Latest Gas Line Break Adds to Woes*, Dallas Morning News Insert, Summer, 1999 at A1.

[41] Attachment C, Rachel Horton, *City Urges Water Conservation After Water Line Slashed*, Irving News, July 11-14, 1999, at A1.

[42] Attachment D, Damages from Contractor Installing Fiber Optic Cable, Plano, Texas, as of June 7, 2001.

[43] September of 1998: Cause No. 96-187697-01, filed in the 96th Texas Judicial District Court on May 21, 2001.

experience and safety procedures of construction contractor crews on-site; and to impose appropriate bonding, insurance and restoration requirements with incentives for safe performance.

Local government requirements not only prevent accidents, but will save all right-of-way users money. For example, common trenching can save money for all concerned, avoiding cases such as that of Sierra Pacific Power Company in Reno, Nevada, which ended up paying $90,000 in additional costs when it dug up a newly resurfaced street for a new installation.[45] In a similar case, Constitution Avenue N.W. in Washington, D.C., after being resurfaced in 1998, was being reopened by e.spire in early 1999 to install communications lines.[46]

C. Communities Experience Substantial Costs For Right-Of-Way Management.

Public rights-of-way involve substantial costs to communities. The most obvious, and smallest, are the costs of administering use – processing applications, reviewing the qualifications of users (and their subcontractors), overseeing installations, and the like. But in addition, a community incurs the cumulative cost of telecommunications companies' incursions into the public rights-of-way. Numerous studies have documented, for example, how repeated street cuts reduce the useful life of a street, even if the surface is "repaired" by the company

[44] April 11, 2000: Settlement Agreement was authorized by City of Arlington Resolution No. 00-185.

[45] Attachment C, *see Nevada Briefs*, Las Vegas Review Journal, Sunday, Aug. 8, 1999, at 4B.

[46] Attachment C, Stephen C. Fehr, *Road Kill on the Information Highway*, Washington Post, Sunday, Mar. 21, 1999, at A1.

making the cut.[47] This cost is massive, and it is increasing. For example, the D.C. government's average of 9,000 street cut applications had swelled to 15,000 by 1998.[48] A news item from San Francisco reported: "In the past three months, three different telecommunications companies have torn up exactly the same strip of road in almost the exact same spot. Three more companies are lined up to do the same."[49]

Further, neither of these categories of costs takes account of the communities' original cost of obtaining the land and constructing and maintaining the physical improvements public rights-of-way require. Full recovery of the asset cost of rights-of-way for communities thus represents substantial amounts in addition to the superficial cost of administration alone.[50]

In effect, failure to recover these costs represents a subsidy to telecommunications companies by the community. Such a subsidy is, of course, something the community may choose to provide, perhaps as a means of stimulating business development. That choice,

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[47] Attachment D, *See* Raymond L. Sterling, *Indirect costs of Utility Placement and Repair Beneath Streets*, University of Minnesota, Report No. 94-20, Aug. 1994, p. 28; Ghassan Tarakji, PH.D, P.E., *The Effect of Utility Cuts on the Service Life of Pavements in San Francisco, Volume I: Study Procedure and Findings, Final Report,* May 1995, p. 19; IMS Infrastructure Management Services, Inc., *Estimated Pavement Cut Surcharge Fees For the City of Anaheim, California Arterial Highway and Local Streets,* Dec. 9, 1994, p. 2,; City of Phoenix, *The Effects of Utility Cut Patching on Pavement Performance in Phoenix, Arizona,* Project 499, July 18, 1990, p. 5.; Andrew Bodocsi, Prahlad D. Pant, Ahmet E. Aktan, Rajagopal S. Arudi, Cincinnati Infrastructure Institute, Department of Civil & Environmental Engineering, University of Cincinnati, Impact of Utility Cuts on Performance of Street Pavements, *Final Report,* 1995, Exec. Summ. at 1.

[48] Fehr, *op. cit.*

[49] Glasner, *High Bandwidth Bureaucracy*, Wired News, Mar. 25, 1999. Attachment B, *see also* Ellen Perlman, *Taxing the Craters in the Street*, Governing, Feb. 1997.

[50] *See* Governmental Accounting Standards Board Statement number 34. This recent addition will require local governments to capitalize and depreciate the costs of right-of-way construction.

however, belongs purely to the community, not to to federal agencies not willing to pay the costs themselves.[51]

Finally, September 11th requires local governments across the country to redirect scarce resources to strengthen homeland security and first response capabilities. In a recent letter to the Congress, New Orleans Mayor and U.S. Conference of Mayors President Marc Morial estimated the cost of the new burdens of homeland security on local governments to be at least $1.5 billion *for next year alone*.[52] Where will this money come from? Unlike the federal government, cities and counties cannot print money, and by law must balance their budgets every year. Fair market value compensation for private use of municipally-maintained public rights-of-way represents sound economical public policy.

IV. REASONABLE RIGHT-OF-WAY COMPENSATION IS NOT A BARRIER TO ENTRY.

A. A Local Government Has A Right To Gain A Fair Price For Its Property.

A local government has a constitutional right to the benefits of property ownership. A private-sector property owner has a right to rent its property for the *market value* of that property, not merely its costs (much less its *administrative* costs). So does a local government.

Because local government property interests are constitutionally protected, the courts' analysis of the value involved in the context of unconstitutional taking (further discussed

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[51] Federal land-owning agencies are also concerned about the problem of adequate compensation for rights-of-way across federal land. Attachment E, *see* "Fair Market Value Analysis for Fiber Optic Cable Permit in National Marine Sanctuaries," a report by the National Ocean's and Atmospheric Administration ("NOAA") as noticed for comment in 66 Fed. Reg. 43135 (Aug. 12, 2001), and studies cited therein.

[52] Agreement B, Ed Somers, *Mayors Irate As Congress Cuts Local Law Enforcement Block Grant By $122 Million*, US Mayor, Nov. 19, 2001, at 4.

below) is relevant. The Supreme Court has addressed the wide range of property interests that, if seized by federal action, would constitute a taking.[53] The opinion in *Lucas v. South Carolina Coastal Council* indicates that the "interests" cognizable for 5th Amendment purposes "may lie in how the owner's reasonable expectations have been shaped by the State's law of property -- *i.e.*, whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land." If the access/use sought by the telecommunications company was cognizable if requested from a private property owner, then it should be comparably valued and enforceable in a public property context. The illusory plausibility of a compensation scheme strictly limited to costs rests on the unstated and erroneous belief that a local government *lacks* the right to sell or lease its property for its full market value.[54]

For this reason, any analysis that focuses on *recovery of costs* as the sole purpose of right-of-way compensation is misguided. There is a persistent (but unsound) impression that local government property is not entitled to the same protection as other property. In *TCG Detroit v. Dearborn*, the federal district court recognized that conveying to a

[53] Attachment A, *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1016 n.7 (1992).

[54] Implementation of Section 302 of the Telecommunications Act of 1996, CS Docket 96-46, Comments of National League of Cities, filed Apr. 1, 1996 (National League of Cities OVS Comments); Joint Motion to Dismiss of PROTEC, the Michigan Municipal League, the Michigan Townships Association, the United States Conference of Mayors, the City of Los Angeles, California, and the Michigan Communities, *In the Matter of TCI Cablevision Of Oakland County, Inc. Petition for Declaratory Ruling, Preemption and Other Relief Pursuant to 47 U.S.C. §§ 541,544(e) and 253*, File No. CSR-4790, filed Sept. 4, 1996.

telecommunications provider the valuable right of access and use of the public's property warrants additional compensation based on the value conveyed.[55]

The federal government's own spectrum auction policies are directly analogous.[56] In devising a scheme to permit telecommunications providers to use a public resource – the electromagnetic spectrum – the federal government made no pretense of limiting the providers' payments to the government's costs of acquiring and administering the electrocmagnetic spectrum. Rather, the federal government recognizes that the for-profit user of such a public resource should pay fair market value for that use. The Federal government has designed an entire auction mechanism to establish that value. Indeed, the FCC and Congress has congratulated itself publicly for wise stewardship of the federal government's "property" based on the large sums telecommunications providers were willing to pay for its use:

- "The spectrum auction is a 'cash cow'. [W]e're trying to milk it for billions more in auction revenue." *Reed Hundt, Former Chairman of the FCC*[57]
- "It would be wrong to allocate these valuable resources for less than their real, free market value." *Sen. John McCain*[58]
- "The digital spectrum is beachfront property on the Cybersea." – *Reed Hundt*[59]

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[55] Attachment A, *TCG Detroit v. City of Dearborn*, 16 F. Supp. 2d 785, 789 (E.D. Mich. 1998), *aff'd* 206 F.3d 618 (6th Cir. 2000).

[56] *See generally, FCC Report to Congress on Spectrum Auctions* (Oct., 1997).

[57] Attachment B, Statement of Commission Chairman Reed Hundt, Christopher Stern, *Hundt Calls Budget Slash A "Mistake,"* Broadcasting & Cable, Sept. 11, 1995.

[58] Letter from Sen. John McCain to Commission Chairman Reed Hundt (Aug. 8, 1995). Chris McConnell, *Senator John McCain to force Federal Communications Commission to auction direct broadcasting satellite frequencies reclaimed from Advanced Communications Corp.*, Broadcasting & Cable, Sept. 18, 1995, at 7.

[59] Attachment B, Commission Chairman Reed Hundt, quoted by Chris McConnell, *Staking Claim to Digital TV*, Broadcasting & Cable, Dec. 18, 1995, at 26.

Economists will agree with the federal government's reasoning. Spectrum, like right-of-way space, is a scarce resource that is most efficiently allocated through a market price mechanism. It is important to assure this limited resource is made available to its highest and best use. It would be most extraordinarily inconsistent if a federal agency were now to take the position that local government property, unlike federal property, should be given away to telecommunications companies at below market values.[60]

A compensation arrangement based on gross revenues has the advantage of directly reflecting the value of the use.[61] In addition, it automatically self-adjusts to the shifting fortunes of the right-of-way user in the market. As revenues increase, reflecting the increased value the user is deriving from use of the right-of-way, a revenue-based payment increases to match.

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[60] "Classical economic theory holds that subsidies distort the market outcome that would have occurred absent the subsidy, thereby creating inefficiencies in resource allocation which lower global welfare." Robert H. Lantz , 10 Am. U.J. Int'l L. & Pol'y 993, 1009 (Spring 1995), citing Jeffrey E. Garten, New Challenges in the World Economy: The Antidumping Law and U.S. Trade Policy, Remarks Before the U.S. Chamber of Commerce, Washington, D.C. (Apr. 7, 1994) (quoting Jagdish N. Bhagwati, Protectionism (1988)).

[61] A local government has a right to measure the value of public property based on the gross revenues derived by use of the property. A word should perhaps be added regarding local governments' attempt to develop sound measures of market value for their property. Such a measure is appropriately based on the value derived by the user from its right-of-way use. Revenue-based compensation is one such method (analogous to the franchise fees paid by cable operators, which are based on gross revenues).

And should the telecommunications provider's market fail, the right-of-way payment scales back accordingly. Thus start-up companies with little or no revenues, and long-established telecommunications behemoths, may be charged by the same gross revenue-based standard and yet pay, as a result, dollar amounts that fairly reflect the value each is deriving from the public rights-of-way. A start-up, or a company in trouble, automatically pays a relatively low price, while a successful company pays more – yet a consistent *proportion* of revenues is paid by each competitor. Thus, such a standard (as distinct from a fixed dollar amount) encourages competitive entry. It is also consistent with revenue-based fees in other industries as diverse as percentage of gross revenues for shopping center space rentals and the 12.5 percent royalty paid to the State of Alaska by crude oil producers for use of the State's property. *See* Alaska Stat. § 31.13.020 (1999).

B. Prohibiting Local Governments from Collecting Fair Compensation Would Create A Subsidy.

A federal or state law that prevents a community from charging a fair price for its property forcibly transfers funds from the community to the user of the property (the telecommunications provider). This is a forced subsidy of the provider by the community. In the days when a single monopoly telephone provider - the nationwide Bell System - provided universal service, it was plausible to think of this as a harmless subsidy from the community to itself (all citizens own the public rights-of-way, all citizens receive telephone service). But in a competitive market, where the telecommunications provider does not provide universal service and the variety of services offered are largely unconfined by rate regulation, that pre-competition rationale disappears. If *all* citizens are compelled to contribute their property (local rights-of-way) at below-market prices in order to lower the costs for the favored telecommunications provider and its customers, the citizens are subsidizing the telecommunications provider (and its customers).

Should a local community choose to use its own property to subsidize new entrants, such a policy can be debated and resolved by the affected citizens themselves through normal democratic processes. But the federal government cannot take local property for a forced subsidy. Such a taking without compensation is both unconstitutional and a violation of the Unfunded Mandates Act.[62] The House adopted the Barton-Stupak amendment in the 1996 Act to avoid any suggestion that the 1996 Act might impact localities in a way that conflicted with the Unfunded Mandates Act.[63]

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[62] Unfunded Mandates Act, 2 U.S.C. § 1501 *et seq.*

[63] Remarks of Congressman Stupak, 141 Cong. Rec. at H 8460 (daily ed. Aug. 4, 1995,).

C. Local Communities Seek To Apply Reasonable Right-Of-Way Compensation Requirements Fairly To All Competitors.

The FCC has questioned right-of-way arrangements that "favor incumbent LECs over competing carriers."[64] Local governments share this concern. In every case where a local community addresses telecommunications use of the public rights-of-way, the single most difficult question is how to deal with the incumbent LEC – the proverbial "900-pound gorilla" in the local telecommunications market.

If the federal government wishes to resolve such anomalies, it must reject proposals to ratify and generalize the incumbents' claims to special privileges. State or federal laws or regulations that favor incumbents are historical relics with no place in a modern competitive environment. At best, such rules are based on a century-old notion of a social compact with the Bell System that allowed a monopoly in return for rate regulation and universal service. That compact no longer applies in today's market. Times change, and the incumbents' views of their historic rights must change with them.

V. PREEMPTION OF LOCAL GOVERNMENT RIGHT-OF-WAY FRANCHISE AUTHORITY HAS NOT INCREASED DEPLOYMENT OF ADVANCED SERVICES.

Texas is a paradigm of industry efforts to preempt local government right-of-way franchise authority. Texas is the third most populous state in America and was one of the first states since 1996 to restrict local government right-of-way franchise authority. The Texas experience since passage of HB 1777 objectively describes the consequences of preemption of

[64] *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, FCC 00-355 (rel. Sept. 28, 2000) at ¶ 75.

local government regulatory authority.[65] The Texas experience is proof-positive that preemption of local authority does not result in accelerated deployment of advanced service.

In 2001, two years after passage of HB 1777, the Public Utilities Commission of Texas ("PUCT") reported that 16.5% of Texas communities have advanced service and 36.1% have high-speed service.[66] However 47.3%, almost half of all Texas communities, do not have

[65] In 1999, the Texas Legislature enacted House Bill 1777 ("HB 1777"). The primary purpose of HB 1777 was to limit the compensation that Texas local government could charge for use and occupation of the public rights-of-way, but HB 1777 also restricted local government authority in other important ways. HB 1777 made voidable all existing franchise agreements. HB 1777 restricted the power of Texas local governments to require telecommunications providers to: obtain franchise agreements to occupy public rights-of-way; build-out entire communities or otherwise prevent "cherry-picking" by telecommunications providers; build facilities to or provide service to public schools, higher educational facilities, community centers, and government buildings as a condition of using and occupying the public rights-of-way; compensate local governments for the administrative costs of processing right-of-way permits and inspecting facility emplacement and construction within the public rights-of-way; and obtain local approval prior to transferring management and operation of communications facilities located within local rights-of-way. Tex. Local Govt. Code §§ 283.052(a), 283.056(a), 283.056(c), and 283.056(f).

Texas municipalities did retain right-of-way management authority to require: permits; registration of right-of-way occupants; maps of facilities placed in the right-of-way, insurance; performance guarantees; joint trenching; location of other facilities prior to commencing right-of-way construction; limitation hours of construction; compliance with noise abatement, dust and disposal of construction material regulations; management of traffic disruption; construction methods for street cuts and restoration; and standards for restoration of the public rights-of-way. However, municipalities may not recover compensation from providers for the costs of enforcing these protective regulations.

[66] Attachment F, Public Utilities Commission of Texas, Report to the 77th Texas Legislature: Availability of Advances Services in Rural and High Cost Areas (Jan. 2001), available at http://www.puc.state.tx.us/telecomm/reports/index.cfm ("PUCT 2001 Adv. Serv. Rept.).

The FCC defines "advanced services" as high-speed broadband services, *i.e.*, infrastructure capable of delivering 200 kilobits per second (Kbps) in one or both directions. Federal Communications Commission, *Deployment of Advanced Services: Second Report and Order*, CC Docket No. 98-146, 15 FCC Rcd. 20913 at ¶¶ 10-11 (2000)("Second Advanced Services Report"). "High-speed" is defined as 200 Kbps in at least one direction; "advanced services infrastructure" is defined as capable of 200 Kbps in both directions. *Id.*

either high-speed or advanced services.[67] By contrast, the Commission reported that by December 2001, 75% of all U.S. zip codes had high-speed service.[68]

In Texas, local right-of-way franchise authority has been preempted. In Texas, communities still do not have access to advanced services. Missouri City, Texas, a fast growing community near Houston, Texas, cannot find a telecommunications company willing to provide high-speed or advanced service to the City or its residents.[69] Under HB 1777, Missouri City cannot impose or require many of the right-of-way management requirements that commentors have asked to have preempted. Yet deployment of advanced services still has not reached Missouri City.

A. Preemption of Local Authority Has Not Increased Deployment of Advanced Telecommunications Services to the Majority of Americans, *i.e.*, Residential and Small Business Customers.

Elimination of local franchising requirements may have actually encouraged CLEC "cherry-picking" and discouraged full deployment throughout communities. The vast majority of Texans do not have advanced services. In the experience of TCCFUI members, competitive providers do not attempt to serve entire communities. Rather, competitive providers attempt to

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[67] This information is based on survey responses collected between March and April 2000. 2001 PUCT Adv. Serv. Rept. at Appendix K.

[68] It is difficult to compare the availability of advanced and high-speed service on a national level. The FCC collects data by zip code and does not report what percentage of zip codes or states have advanced service compared to high-speed or slower service. Zip code data collection creates unreliable statistics, since a zip code will be considered to have advanced service if only one business subscriber has a T-1 line, while all surrounding residents in the same zip code have only 28 Kbps dial-up modem service.

[69] *See Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerated Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996 ("Section 706 NOI"), Reply Comments of TCCFUI,* Attachment A, Declaration of Sandra Stanley.

serve a same small, lucrative subset of a community – *i.e.*, large office buildings and corporate complexes.

- Attachment G is a map of AT&T Broadband's proposed cable modem service routes for Plano, Texas. Portions of the map without hatchette marks are sections of Plano in which AT&T does not plan to offer high-speed cable modem service to the entire community. AT&T Broadband is planning to provide high-speed service to the large businesses that lie along the community's major rights-of-way.[70] But as the map demonstrates, significant numbers of Plano residents will not be able to receive high-speed cable modem service within any reasonable period of time.

- The FCC reports that by zip code, most Plano, Texas residents have a choice of 7 to 10 high-speed service providers.[71] Yet the Plano, Texas Comments reported that almost 40% of Plano residents could not receive high-speed service.[72]

The evidence demonstrates that advanced and high-speed services are still not deployed to all Texans in a reasonable and timely fashion. The elimination of local government right-of-

[70] *See also* Section 706 NOI Comments of Plano, Texas ("Plano § 706 Comments") at Exhibit A. One Plano resident stated: "DSL and Cable are NOT available in my area from any vendor!! Cable and DSL are available 2 blocks from my home. I have been trying to get Cable Modem or DSL for over 3 years….."

[71] Federal Communications Commission, *High-Speed Service Providers As of 6/30/01 [Number of High-Speed Service Holding Companies By Zip Code]*, pp. 368-369 [TX Zip Codes 75023 (9), 75024 (9), 75025(7), 75074 (10), 75075 (10), 75093 (8), 75094 (4)], available at http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/comp.html.

[72] Plano § 706 Comments at 1. Anecdotal evidence supports the same conclusion – residential customers do not have access to high-speed service. Plano, TX Comments at Exhibit B. One Plano resident stated: "My husband and I live in Los Rios Park, an apartment complex on 14th Street. We would very much like to get either DSL or cable modem. I have called Verizon, SWBell, and AT&T and none of these companies can provide high-speed internet service here…."

way management authority requirements has not changed this reality. Residential and small business customers are not likely to have access to high-speed or advanced services.

B. Broadband Deployment Is Dependant on Access to Capital Financing, Not the Absence of Local Regulation.

The barrier to entry is not local regulation – it is lack of access to capital financing. As Adelphia Business Solutions ("ABS") commented to the FCC: "While revenues were limited, and profits non-existent, CLECs were able to continue their forward progress because of the confidence placed in them by the financial markets, and the capital that such investment provider for facilitates construction. Now that bubble has burst."[73] ABS noted that CLEC capitalization reached its pinnacle in March 2000.[74] The Commission's most recent high-speed services data supports ABS' claim. Between December 1999 and December 2000, the number of high-speed service lines grew by 158% and advanced services lines grew by 118%. In the latter half of 2000, between June 2000 and December 2000, rate of deployment slowed. High-speed service lines grew by only 63% and advanced service lines by 51%.[75] The declining deployment rate of advanced services has no correlation with local right-of-way management regulations and further attempts to restrict local right-of-way authority will not reverse the declining deployment rates.

Furthermore, as of June 1, 2001, fifteen CLECs had filed for bankruptcy protection. For local governments, this means that fifteen bankrupt providers now have facilities located in the

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[73] Section 706 NOI Comments of Adelphia Business Solution ("ABS § 706 Comments") at 6-7.

[74] ABS § 706 Comments at 1.

[75] Federal Communications Commission, *High-Speed Services For Internet Access: Subscribership As of December 31, 2000*, Tables 2 & 3 (Aug. 9, 2001) (available at http://www.fcc.gov/ccb/stats).

public rights-of-way, facilities whose location may or may not have been reported to state and local authorities, and facilities whose ownership and control is now uncertain. These bankrupt providers may have customers – which may include government and public schools – who may or may not be receiving service. Further limiting local right-of-way authority will not reverse these bankruptcies and it will not speed broadband deployment.

VI. CONCLUSION

Any policy recommendations issued by NTIA must recognize and comply with the legal authority reserved for state and local governments by Congress in enacting Section 253 of the Telecommunications Act of 1996. State and local governments retain the right to implement and enforce local right-of-way management regulations, and to require fair and reasonable compensation for use and occupation of the public rights-of-way. Broadband deployment is driven by access to capital financing and demographic characteristic. Local regulation is neither a disincentive nor a barrier to broadband deployment, and the preemption of local authority over rights-of-way has hurt, not helped broadband deployment.

Respectfully submitted,

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LIST OF ATTACHMENTS

Attachment A. Case Law

- *Cablevision of Boston, Inc. v. Public Improvement Comm'n*, 184 F.3d 88 (1st Cir. 1999).
- *BellSouth Telecommunications, Inc. v. Town of Palm Beach*, 252 F.3d 1169 (11th Cir. 2001).
- *Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997), *cert. granted*, 118 S.Ct. 879 (1998).
- *TCG v. White Plains*, 125 F. Supp. 2d 81 (S.D.N.Y. 2000).
- *City of St. Louis v. Western Union Tel. Co.*, 148 U.S. 92 (1893).
- *TCG Detroit v. City of Dearborn*, 206 F.3d 618 (6th Cir. 2000).
- *Omnipoint Comm'ns, Inc. v. Port Authority of New York and New Jersey*, 1999 WL 494120 (S.D.N.Y. 1999)
- *BellSouth Telecommunications v. City of Orangeburg*, 522 S.E.2d 804 (S.C. 1999).
- *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 n.7 (1992).
- *TCG Detroit v. City of Dearborn*, 16 F. Supp. 2d 785, 789 (E.D. Mich. 1998), *aff'd* 206 F.3d 618 (6th Cir. 2000).

Attachment B. Federal Communications Commission Decisions

- *In the Matter of TCI Cablevision of Oakland County*, 12 FCC Rcd. 21,396, *aff'd* FCC Rcd. 16,400 (1998).
- *In re Missouri Municipal League*, 16 FCC Rcd. 1157, 2001 WL 28068 (2001).
- *In re Minnesota*, 14 FCC Rcd. 21,697, 21,730 (1999).
- *In re American Communications Servs., Inc.*, 14 FCC Rcd. 21,579, 21,587-88 (1999).
- *In re Cal. Payphone Ass'n*, 12 FCC Rcd. 14,191, 14,203 (1997).

Attachment C. Media Articles

- Mavis Scanlon, *RCN: After the Fall*, Cable World, Jan. 1, 2001.
- Carri Karuhn, *Hoffman Drawing the Lines for Future; Town Out to Control Disruption of Cables*, Chicago Tribune, October 9, 1997, at 1.
- Cecilia M. Quick, *Mastering Telecommunications: Milpitas [California] Develops A Master Plan*, Government Finance Review, Feb. 1997, at 48.
- James W. Crawley, *The Dream is a Wonderland of Information and Entertainment. But for now, San Diego's Ambitious Rewiring is …IN THE TRENCHES*, San Diego Union-Tribune, May 29, 1994, at I-1.
- Joanna Glasner, *High Bandwidth Bureaucracy*, Wired News, Mar. 25, 1999.

- S.K. Bardwell, *Gas Explosion Destroys Home, Forces Evacuation*, Houston Chronicle, Nov. 3, 2000, at A35.
- Wendy Hundley, *Plano Creek Cleaned After Sewage Spill*, Dallas Morning News, Oct. 14, 2000, at A37.
- Ian McCann & Steve Quinn, *Water Mains Flood Downtown*, Dallas Morning News, Sept. 5, 2000, at A1
- Rani Cher Monson & Melissa Borden, *3,600 Lose Emergency Phone Service*, Arlington Morning News, July 16, 1999, at A1.
- Jeff Prince, *Telephone Outage Jangles Commerce*, Star-Telegram, July 17, 1999, at A1.
- Jason Lamers, *Latest Gas Line Break Adds to Woes*, Dallas Morning News Insert, Summer, 1999 at A1.
- Rachel Horton, *City Urges Water Conservation After Water Line Slashed*, Irving News, July 11-14, 1999, at A1.
- *Nevada Briefs*, Las Vegas Review Journal, Sunday, Aug. 8, 1999, at 4B.
- Stephen C. Fehr, *Road Kill on the Information Highway*, Washington Post, Sunday, Mar. 21, 1999, at A1.
- Ellen Perlman, *Taxing the Craters in the Street*, Governing, Feb. 1997, at _____.
- Ed Somers, *Mayors Irate As Congress Cuts Local Law Enforcement Block Grant By $122 Million*, US Mayor, Nov. 19, 2001, at 4.
- Christopher Stern, *Hundt Calls Budget Slash A "Mistake"* [Statement of Commission Chairman Reed Hundt], Broadcasting & Cable, Sept. 11, 1995.
- Chris McConnell, *Staking Claim to Digital TV* [Commission Chairman Reed Hundt, quoted by Chris McConnell], Broadcasting & Cable, Dec. 18, 1995, at 26.

Attachment D. Right-Of-Way Studies and Reports

- Plano, Texas, Damages from Contractor Installing Fiber Optic Cable, as of June 7, 2001.
- Raymond L. Sterling, Indirect costs of Utility Placement and Repair Beneath Streets, University of Minnesota, Report No. 94-20, Aug. 1994.
- Ghassan Tarakji, PH.D, P.E., The Effect of Utility Cuts on the Service Life of Pavements in San Francisco, Volume I: Study Procedure and Findings, Final Report, May 1995.
- IMS Infrastructure Management Services, Inc., Estimated Pavement Cut Surcharge Fees For the City of Anaheim, California Arterial Highway and Local Streets, Dec. 9, 1994.
- City of Phoenix, The Effects of Utility Cut Patching on Pavement Performance in Phoenix, Arizona, Project 499, July 18, 1990.
- Andrew Bodocsi, Prahlad D. Pant, Ahmet E. Aktan, Rajagopal S. Arudi, Cincinnati Infrastructure Institute, Department of Civil & Environmental Engineering, University of Cincinnati, Impact of Utility Cuts on Performance of Street Pavements, Final Report, 1995.

Attachment E. Federal Agency Reports

- National Ocean's and Atmospheric Administration ("NOAA"), "Fair Market Value Analysis for Fiber Optic Cable Permit in National Marine Sanctuaries," as noticed for comment in 66 Fed. Reg. 43135 (Aug. 12, 2001).

Attachment F. State Agency Reports

- Public Utilities Commission of Texas, Report to the 77th Texas Legislature: Availability of Advances Services in Rural and High Cost Areas (Jan. 2001), available at http://www.puc.state.tx.us/telecomm/reports/index.cfm ("PUCT 2001 Adv. Serv. Rept.).

Attachment G. Map of AT&T Broadband's Proposed Cable Modem Service Routes for Plano, Texas.

Exhibit 6 – LSGAC Recommendations

FCC Local and State Government Advisory Committee

Advisory Recommendation Number 1:

POLICY STATEMENT ON STATE AND LOCAL RIGHTS-OF-WAY AND TELECOMMUNICATIONS SERVICE COMPETITION

The Committee believes the FCC's action in creating the Committee is a major step toward developing a constructive dialogue between the FCC and the state and local governments. The FCC is currently considering many individual petitions by various telecommunications companies and trade associations to preempt state and local control of rights-of-way. The Committee expresses its commitment to work closely with the FCC Commissioners and staff as they review the various petitions. To begin that process, the Commission today adopts the following statement of principles that it recommends the Commission incorporate as petitions and issues develop before the FCC.

FIRST PRINCIPLES

State and local governments are trustees of the public's rights-of-way. Rights-of-way are real estate property rights of substantial economic value and interest to local communities. The public has a right to fair compensation for occupancy and use of its property.

The FCC is responsible for setting national standards and rules governing the conduct of the interstate telecommunications marketplace to assure fair and open competition that favors neither incumbents nor new entrants.

State, local and FCC officials share the common goals of bringing true and effective competition in telecommunications services to all our citizens as quickly as possible while minimizing the adverse effects on other essential community needs, costs and interests.

The 1996 Telecommunications Act defined the balance between federal and state and local responsibilities in telecommunications. That law designates the FCC as the primary entity responsible for rules and regulations related to the entry into and the offering of interstate telecommunications services. The same law designates states and local governments as the primary entities responsible for rules and regulations related to telecommunications service providers entry into, compensation for use of, and behavior in the public's right-of-way.

The new world of competitive telecommunications presents all levels of government in the federal system with novel questions that require careful and collegial consideration. The FCC brings unique expertise in the technologies and business operations of telecommunications companies. State and local governments bring unique expertise in the valuation and operation of multiple uses of the public's rights of way. The FCC and state and local governments should assume the mutual burden of educating the other parties in their respective areas of expertise. Regulation, preemption, and formal legal action against another level of government should be the last, not the first, recourse to resolve conflicting interests.

Rights-of-way disputes between telecommunications companies and local governments should be resolved in local jurisdictions. The FCC should avoid adopting broad policy statements or decisions that implicate

other matters of state and local interests such as cable television network design without first having full and complete dialogue with the Committee.

COMMITTEE ACTIONS

The Committee is prepared t meet with an appropriate delegation of industry representatives to explore areas of agreement on rights-of-way issues pertaining to state and local governments.

The Committee is prepared to participate in the development of suggestions to "level the playing field" to require incumbent operators pay compensa- tion for rights-of-way that embody fair valuation. The Committee asks that the Commission work with the Committee on possible actions the Commission might take to achieve the result that incumbent operators accept fair and modern valuation for use of the public's right-of-way.

FOR THE FCC LOCAL AND STATE
ADVISORY COMMITTEE

_____

Kenneth S. Fellman, Chair
June 27, 1997

FCC Local and State Government Advisory Committee
Advisory Recommendation Number 23:

Notice of Proposed Rulemaking, Notice of Inquiry, and Third Further Notice of Proposed Rulemaking, WT Docket No. 99-217, CC Docket No. 96-98

1. The Local and State Government Advisory Committee ("LSGAC") submits this Recommendation in regard to the Federal Communication Commission's ("Commission") Notice of Proposed Rulemaking ("NPRM"), Notice of Inquiry ("NOI"), and Third Further Notice of Proposed Rulemaking ("Third Notice") in WT Docket No. 99-217 and CC Docket No. 96-98. The LSGAC addresses only the issues raised in the NOI in this Recommendation.

2. State and Local governments have three vital interests in the matters addressed by the NOI.

a. First, state and local governments are the owners and managers of public property. As trustees for local taxpayers, state and local governments have a duty to assure the highest and best use of such property, including rights-of-way. In addition, any authorized use must not unnecessarily inconvenience, threaten the safety of, or impose uncompensated costs on citizens. Any Commission action that intrudes on right-of-way management authority will significantly harm state and local government efforts to fulfill these obligations.

b. Second, state and local governments have an obligation to protect the public investment in public rights-of-way and accompanying infrastructure, to balance competing demands on this public resource, and to charge fair and reasonable compensation for rights conveyed to privileged users of these public resources. Any Commission action that intrudes on right-of-way compensation authority will significantly harm state and local government efforts to fulfill these obligations.

c. Third, as the Commission stated in its NOI, "the assessment and collection of taxes and other fees is a vital function of State and local governments, indeed a necessary one to support all of those governments' other functions." NOI ¶ 81. Therefore, state and local governments have a significant interest in any Commission action that intrudes on traditional state and local taxing authority.

3. The LSGAC believes that there are multiple and appropriate legal restraints on the Commission's authority to intrude into the property relationships between State and local governments and telecommunications companies, or into state or local tax policy. These restraints include:

a. The Commission's authority under 47 U.S.C. § 253 is limited. That section does not preempt State and local government right-of-way regulations and compensation requirements as long as those regulations and requirements do not prohibit or have the effect of prohibiting the provision of a telecommunications service. Moreover, even right-of-way regulations and compensation arrangements that might prohibit or have the effect of prohibiting entry may not be preempted if they are competitively neutral and nondiscriminatory. And any decisions as to the latter conditions must be made by the courts, rather than by the Commission.

b. State and local governments enjoy significant constitutional protections from Federal intrusion.

i. Federal appropriation of publicly owned property, whether the physical or regulatory, whether for the federal government's own benefit or for the benefit of favored private enterprises, raises significant and difficult 5th Amendment issues.

ii. The 10th Amendment requires careful balancing of powers between national and state sovereigns.

c. The Commission has no discernible authority to preempt State or local tax provisions, or to otherwise interfere with the development and application of State and local fiscal policies. Nor is there any substantial support in the record in this proceeding for the claim that State and local tax policies are likely to have a significant adverse affect on the development of competitive markets for telecommunications service.

4. There is no evidence of record in this proceeding to suggest that any State or local government requirements identified by industry commentators are impeding competitive entry.

5. The LSGAC believes that there are also sound practical reasons for the Commission to leave public right-of-way issues to be addressed by State and local governments. These reasons include:

a. Lives are at stake and the Commission is without expertise. Improperly managed rights-of-way threaten real economic and personal injury -- even loss of life. Natural gas explosions and subterranean floods of retail space, disruption of water supplies, sewage systems and electrical service are significant safety and economic risks that attend the installation and maintenance of telecommunication and other utility facilities in public rights-of-way. State and local governments and their constituents bear these risks. Unless the federal government is inclined to underwrite those risks, local governments must have full authority to contain them.

b. Telecommunications providers are entering markets without regard to local right-of-way policies and practices, but rather based on market assessments that are not dependent on right-of-way management policies. Formerly passive management policies appropriate in the era of the historical monopoly environment are no longer adequate to protect other users of the rights-of-way or the facilities of the multiple telecommunications providers, or to protect the public safety and welfare.

c. Public right-of-way management is historically and properly a core function of local government. Each community has distinct and unique physical characteristics, local infrastructures, environmental concerns, and health and safety issues. A single nationwide right-of-way regulatory regime won't work and will cause great harm to the local right-of-way user. Only local regulations can address each necessary facet of right-of-way regulation, from construction and excavation to space allocation and facility relocation, restoration and fee requirements in a fashion that will meet local community needs.

d. The comments submitted in this proceeding reveal the breadth and variety of issues confronting right-of-way management authorities. These issues are unique and local in nature. They cannot be addressed by a single national resolution and the Commission does not have the resources to substitute its own case-by-case evaluation of the myriad local requirements and concerns that are at stake.

6. National local government organizations such as the National League of Cities, the National Association of Counties, and other state and municipal organizations are working to develop voluntary "best practices" guidelines for right-of-way management by state and local governments. These guidelines will take into account the views of industry commenters. The Commission should rely on those most directly involved with right-of-way issues to draw from their experiences "in the field."

7. Many of the comments provided in this proceeding fail to identify the jurisdictions of which they complain and therefore do not allow the jurisdictions the opportunity to respond. The Commission recognized that a jurisdiction should be permitted an opportunity to respond to a petition that may result in the preemption of its regulations in October of 1999. In its Memorandum Opinion and Order, *In the matter of Amendment of 47 C.F.R. §1.120 et. Seq. Concerning Ex Parte Presentations in Commission Proceedings,* Released November 9, 1999, the Commission adopted rules that require a party filing preemption petition to serve a copy of the petition on each state and local jurisdiction to which the petition applies as well as those whose actions are identified as warranting preemption. Failure to serve such jurisdictions results in the dismissal of the petition without consideration. In keeping with this policy, the Commission should accord little weight to comments in this proceeding that do not identify the jurisdictions complained of and therefore do not permit them to respond.

RECOMMENDATION: The Local and State Government Advisory Committee recommends that the Commission take no regulatory action at this time with respect to the issues raised in the Notice of Inquiry.

Adopted by the LSGAC on August 23, 2000.

Kenneth S. Fellman
Chairman

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FEDERAL COMMUNICATIONS COMMISSION
LOCAL AND STATE GOVERNMENT ADVISORY COMMITTEE

Reply to: Kenneth S. Fellman, Esq.
Kissinger & Fellman, P.C.
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Denver, Colorado 80209
303-320-6100 Telephone; 303-320-6613 Facsimile

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October 23, 2000

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OCT 27 2000

Federal Communications Commission
Office of Secretary

Ms. Magalie Roman Salas, Secretary
Federal Communications Commission
445 Twelfth Street, SW, TW-B204
Washington, D.C. 20554

Re: Notice of Proposed Rulemaking, Notice of Inquiry, and Third Further Notice of Proposed Rulemaking, WT Docket No. 99-217, CC Docket No. 96-98

Dear Ms. Salas:

On behalf of the Commission's Local and State Government Advisory Committee, I am hereby submitting an original and two copies of the LSGAC's Advisory Recommendation No. 24 with respect to the referenced matter.

Very truly yours,

Kenneth S. Fellman
Chairman, LSGAC

KSF/eaj
Enclosure
cc: Honorable William E. Kennard, Chairman (w/encl)
Honorable Harold Furchtgott-Roth, Commissioner (w/encl)
Honorable Gloria Tristani, Commissioner (w/encl)
Honorable Susan Ness, Commissioner (w/encl)
Honorable Michael Powell, Commissioner (w/encl)
LSGAC Members and Staff (w/encl; via email)

No. of Copies rec'd 0
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FCC Local and State Government Advisory Committee
Advisory Recommendation Number 24:

Notice of Proposed Rulemaking, Notice of Inquiry, and Third Further Notice of Proposed Rulemaking, WT Docket No. 99-217, CC Docket No. 96-98

1. On August 23, 2000, the LSGAC issued its Advisory Recommendation No. 23 in the Competitive Networks Notice of Inquiry, WT Docket No. 99-217, CC Docket No. 96-98. In that Recommendation, the LSGAC suggested that the record in this proceeding did not support further action by the Commission. Specifically, the LSGAC recommended that the Commission rely upon the expertise of local government associations with respect to best practices regarding management and control of local government rights of way.

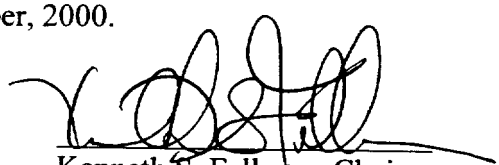
2. Since the date of Advisory Recommendation No. 23, the National League of Cities, the National Association of Counties, the U. S. Conference of Mayors, and the National Association of Telecommunications Officers and Advisors have made an historic agreement to undertake the development a local government resource guide to management of public rights of way.

3. Every local government has unique interests and concerns which must be incorporated into its rights of way management policies. At the same time, all local governments must address their unique issues consistent with the policies of the Telecommunications Act of 1996. Rarely have these four national associations come together to commit resources to proactively address such a timely issue of concern to all local governments. The LSGAC believes that this project will result in a comprehensive and useful tool for local governments throughout the nation to address best management practices, with examples of successful rights of way regulation. Further, there will be a clearer understanding of methods to manage access to and occupation in public rights of way so as to protect local government concerns while providing the telecommunications industry with non-discriminatory and competitively neutral access to rights of ways.

RECOMMENDATION:

To the extent that the Commission is otherwise inclined to follow the NOI with its own attempt to develop right of way management guidelines or practices, the LSGAC respectfully recommends that the Commission refrain from doing so, and defer instead to the expertise of the national associations representing local government.

Respectfully submitted on this 23rd day of October, 2000.



Kenneth S. Fellman, Chairman
LSGAC

FEDERAL COMMUNICATIONS COMMISSION
LOCAL AND STATE GOVERNMENT ADVISORY COMMITTEE

Reply to: Ken Fellman
3773 Cherry Creek N. Drive, Suite 900
Denver, Colorado 80209
303-320-6100 Telephone; 303-320-6613 Facsimile

February 10, 2003

VIA ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, SW, TW-B204
Washington, D.C. 20554

Re: LSGAC Ex Parte Filing / Advisory Recommendation No. 31
In the Matter of Appropriate Regulatory Treatment for
Broadband Access to the Internet, CC Docket No. 02-52

Dear Ms. Dortch:

On behalf of the Commission's Local and State Government Advisory Committee, I am hereby submitting the LSGAC's Ex Parte Filing of Advisory Recommendation Number 31 with respect to CC Docket No. 02-52; In the Matter of Review of Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities.

Very truly yours,

Kenneth S. Fellman
Chairman, LSGAC

KSF/eaj
Enclosure
cc: Hon. Michael K. Powell, Chairman (w/encl.; via email)
Hon. Kathleen Q. Abernathy, Commissioner (w/encl.; via email)
Hon. Michael J. Copps, Commissioner (w/encl.; via email)
Hon. Kevin J. Martin, Commissioner (w/encl.; via email)
Hon. Jonathan S. Adelstein, Commissioner (w/encl.; via email)
LSGAC Members and Staff (w/encl.; via email)
Kris Monteith (w/encl.; via email)

FCC Local and State Government Advisory Committee
Advisory Recommendation Number 31:

In the Matter of Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities, CS Docket 02-52

1. **Introduction.** The Local and State Government Advisory Committee ("LSGAC") submits this Recommendation in regard to the Federal Communication Commission's Notice of Proposed Rulemaking ("NPRM") CS Docket No. 02-52.

2. **Background.** As stated in Advisory Recommendation Number 26, State, local and tribal governments seek the rapid deployment of advanced networks. The deployment of competitive broadband facilities providing cable and telecommunications services can create meaningful competition to incumbent service providers and will enhance the welfare of all citizens and the economic development of local communities.

3. The LSGAC believes the Commission has taken a mistaken direction by classifying cable modem service as a non-Title VI service. As we stated in Advisory Recommendation 26, classifying cable modem service as an "information service" does not preclude the service from also being a "cable service". The two definitions are not mutually exclusive. The Commission's insistence in March 2002 that cable modem service was not a cable service has caused extensive confusion among consumers, cable operators, and state and local governments.

4. **Discussion.** Cable modem service providers must be obligated to address local community needs and interests as a condition for deploying cable modem service facilities. The March 2002 decision declaring that cable modem service is no longer subject to traditional Title VI requirements has frustrated state and local efforts to accelerate cable broadband deployment by allowing cable operators to question state and local authority to require appropriate pre-conditions to the deployment of these facilities. State, local and tribal governments retain the inherent police power authority to protect consumers from unfair and unreasonable business practices. The for-profit use of the public rights-of-way by private entities must be efficiently and effectively managed and compensated, consistent with the dedication of this public property to serve the public interest. The Commission should take action in the pending NPRM to acknowledge these state and local powers over the deployment and marketing of cable modem facilities.

5. State and local regulation of cable modem service is essential to ensure that cable modem service is rolled out fairly to *all* Americans. The continued growth of this service depends in part on consumers believing that the service will perform as promised and without risk to personal privacy or computer hackers. Services promised must be services delivered, and consumers must have an effective remedy when an operator falls

short of promises and community obligations. For example, local authorities must be able to address any redlining in the rollout and availability of the service.

6. A cable system providing cable modem service imposes more intrusive structures and right-of-way impacts on a community than a traditional cable system. Local authorities must manage these impacts to assure the entire community receives the highest and best use of the rights-of-way at the lowest overall cost to the taxpayer. The Commission should ignore industry pleas for a "free-pass" in the use and consumption of public real estate for the delivery of cable modem service. Cable modem service is a business dependent on permanent, intrusive occupancy of the public rights-of-way, and local governments have authority to charge appropriate rent to avoid taxpayer subsidies to a private, commercial business.

7. The Commission should use this docket to explicitly recognize this local authority does exist and is consistent with the Commission's March 2002 classification decision. The Commission treads on uncertain legal ground if it relies solely on Title I authority to control the deployment and behavior of cable modem service providers. The Commission should recognize the importance of local property rights and independent local authority to regulate the activities of cable operators when they abuse or injure their consumers. State law doctrines of property law and consumer protection can resolve any issues that may arise with respect to cable modem service, including past unpaid cable modem franchise fees.

8. The LSGAC also recommends the Commission explicitly recognize in this proceeding that provisions of Title VI still apply to the cable modem service activities of cable operators. Congress declared that "other service(s)", presumably including cable modem service, provided by a cable operator over a cable system remain subject to "any requirements contained in a franchise", pursuant to Section 624(b)(2) of the Federal Cable Act. There are other examples throughout Title VI that explicitly cover "cable operators", including all of the non-telecommunications services on the cable system. For example, cable modem service is subject to the privacy provisions of Title VI, section 631, which explicitly authorize local authorities to establish privacy requirements.

9. Finally, in light of recent marketplace mergers and the Commission's recent decisions permitting unprecedented concentration of the ownership of the cable industry, including the provision of cable modem service, individual state and local governments must be prepared to address anti-competitive and discriminatory actions by a cable operator trying to control access to and the content of the internet.

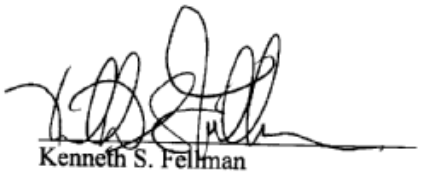
RECOMMENDATION: The Local and State Government Advisory Committee recommends:

a. That the Commission acknowledge that state and local governments have inherent police power authority over cable modem service, separate and apart from Title VI.

b. That the Commission clarify that its March 2002 decision did not interfere with state and local authority to require franchises, compensation and universal deployment for cable modem service in return for occupation and use of public rights-of-way.

c. That the Commission clarify that its March 2002 decision did not interfere with the authority of state and local governments to impose customer service requirements to address anti-competitive actions by cable modem service providers.

Dated this 10th day of February, 2003.



Kenneth S. Fellman
Chairman

Exhibit 7 – LSGAC Rights-of-Way Presentation for FCC Staff

Agenda

FCC Staff Meeting with

LSGAC Chair, Vice-Chair, and Staff
January 25, 2002
7:30 AM

I. Introduction to the History and Purpose of the LSGAC (Ken Fellman)

II. A Brief Introduction to Public Rights-of-Way:

A. Local Governments and the FCC Should Be Cooperating--Not Scapegoating.
B. Public Rights-of-Way (PROW) is the single most important government asset.
C. PROW is not a free good.
D. Conflicting demands on PROW cause real problems and require real solutions.
E. ILEC/CLEC criticisms of Local Governments don't mirror real world events.

III. Advanced telecommunications deployment accelerates the need for FCC/Local détente.

IV. Conclusion

INDEX

A

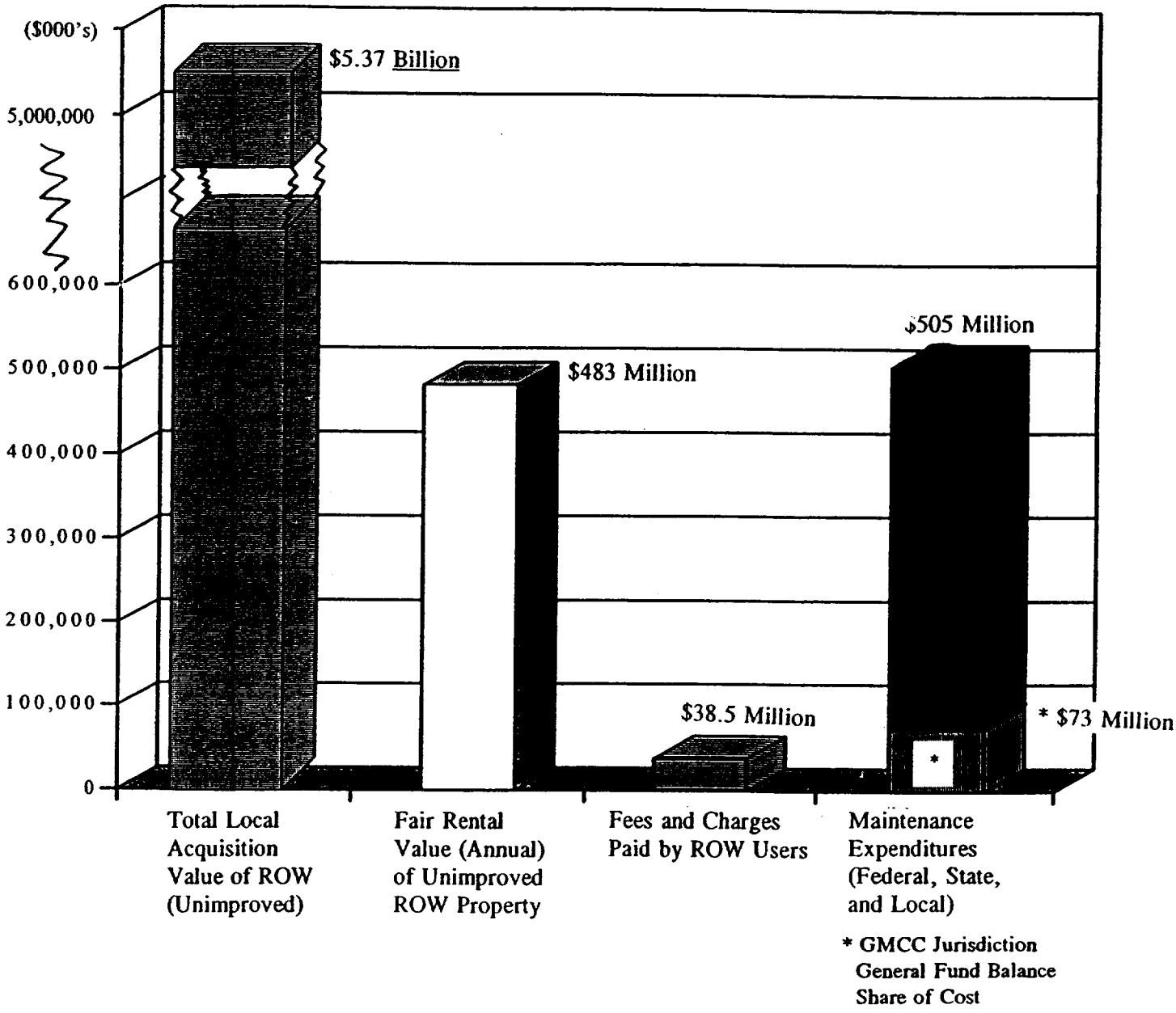
Annual Local Spending Tied to Rights-of-Way

- $26 billion in roads and streets
- $14 billion in public transit
- $19.5 billion in sewer systems
- $24 billion in water supply systems
- $32 billion in other muni owned utilities

RIGHT OF WAY VALUE, COST, AND FEE COMPARISON

Source: Greater Metro Cable Consortium

Estimated Figures for the Denver Metro Area



Acquisition Value: Extrapolated from actual property acquisition costs in representative cases.
Fair Rental Value: 9% of Acquisition Value. Based on estimates from regional property valuation experts.
Fees and Charges: Annual revenues received from private, permanent users of the rights of way.
Maintenance: Local costs estimated from actual rights of way maintenance budgets of local jurisdictions.

As this graph indicates, the taxpayer-funded rights of way acquisition and maintenance costs dwarf the relatively small contribution of private occupants of the public rights of way. Competition in the telecommunications market will necessarily force these costs to increase.

Without the ability to charge all users fair and reasonable rent for the use of public property, local governments will be forced to raise taxes to cover these increased costs.

Federal Mandates Imposing Costs on Rights-of-Way

- **Streets & Transit:**
  - ISTEA
  - Clean Air Act
  - NEPA
- **Electric/Gas Distribution:**
  - Energy Policy Act
  - Pipeline Safety Act
- **Water Supply:**
  - Safe Drinking Water Act
- **Sewer Systems:**
  - Clean Water Act

Indirect Costs of Utility Placement and Repair Beneath Streets

FINAL REPORT

Prepared by

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August 1994

Submitted to

Minnesota Department of Transportation
Office of Research Administration
200 Ford Building, 117 University Avenue
Saint Paul, MN 5155

Chapter 1
Introduction

1.1 Background

An urban area requires the provision of many services to businesses, homes and public facilities. These services may include water, sewer, electricity, gas, telephone, other cable services, district heating and district cooling. Most of these services are placed underground and most beneath public streets and highways. Placement of these utilities underground offers the provision of large service networks more or less invisibly across the urban area and provides physical and environmental protection for the services.

Problems with underground services appear when further work is required on the system in order to make new connections, provide a system expansion, or carry out utility repair, replacement or renovation. The need for street access for installation and repair of utilities provides a continuing interplay between the needs for utilities to be installed and maintained and other public interests in:

- the minimization of the total societal costs of utility work
- the effective management of the public space beneath public rights of way
- the mitigation of traffic congestion
- the management of total life-cycle costs of street and highway pavements

This report examines these questions and continues a discussion of whether the overall public "good" is best served by the manner in which decisions are currently made about the placement of utilities beneath public streets and the construction alternatives chosen for installation and repair.

The implicit assumptions which govern the current placement and maintenance of utility systems beneath public rights-of-way are being questioned as the impact of such work increases, public expectations for environment controls rise, and alternative less-intrusive methods of construction and repair become available. In the past, the traffic intensities were lower than today, traffic could more easily be diverted and the public was more accepting of the inconvenience of road works -- with little question as to the relationship of their delay to the manner in which the utilities were laid out or being repaired.

These issues have been raised in many countries in the past ten to fifteen years. For example:

> *During the next decade, construction of new highway facilities will be less intensive than in the recent past. Instead, reconstruction and maintenance activities will increase. As these activities increase, correspondingly higher traffic volumes will be affected. Therefore, improving safety and minimizing negative economic and*

environmental impacts of work zones will be become more critical than ever (FHWA, 1981).

Should the general public be entitled to demand that preventative maintenance, replacement or renovation are carried out with the overall economy in mind and not that of the particular undertaker? In the long run it is the public who pays for the works on the country's infrastructure - either directly through charges/taxes or indirectly(Read and Vickridge, 1990).

A related question, less commonly addressed is that the underground space beneath public rights-of-way is public resource which has value. The tradition of using this space for utility placement on a first-come, first-served basis or on a utility corridor basis can greatly degrade the value of the resource in solving future societal needs. This topic and the issues posed by such considerations are examined in Chapter 2.

1.2 The Size of the Problem

The magnitude of the U.S. investment in underground utility infrastructure is enormous; the approximate mileage of the existing U.S. utility network in 1989 was as follows (Kramer et al, 1992):

Electricity:	595,500 km (370,000 miles) of underground distribution cables
Natural gas:	1,448,400 km (900,000 miles) of distribution mains and 965,600 km (600,000 miles) of distribution services
Sewers:	965,600 km (600,000 miles) of collector sewers with 600,000 lateral connections
Telephone:	418,400 km (260,000 miles) of direct buried cables and 482,800 km (300,000 miles) of cable in conduit
Water:	724,200 km (450,000 miles) of distribution pipe

In the U.K., where much of the research regarding the indirect costs of utility work has been carried out, the length of underground utility mains was estimated in 1983 to be 1.65 million kilometers compared to the length of the road network of 0.34 million kilometers (Dept. of Transport, 1985 in Bristow and Ling, 1989). The U.K. road network carries an estimated 68 vehicles per kilometer of road. The Confederation of British Industries has estimated that the overall cost of traffic congestion in the UK's urban conurbations has reached UK£3 billion per year (approximately US$4.5 billion). It also has been estimated that there are over 2 million road openings a year by utilities in the U.K, representing an average of about 5.6 openings per kilometer of road per year (Vickridge et al., 1992).

In the U.S., the impact of utility work on traffic congestion varies greatly across the country. The most affected sites are those with a road network already at or close to capacity during peak hours and few acceptable alternatives to reroute traffic away from the affected stretch of roadway. Less densely populated cities with wider streets and a grid-pattern street layout (typical of many newer western and mid-western cities tend to be less affected.

Chapter 2
Value of Land Beneath Public Streets

2.1 Background

Land in most countries of the world is available for private ownership. Also, in most countries, ownership of the land surface carries with it ownership of the underground region beneath and ownership of the air space above the specified surface land area. This ownership usually extends downwards to the center of the earth but upwards only as far as reasonable use of the space can be made. The latter restriction on the upward extent of the space reserved by surface land ownership came after the spread of aviation and was introduced to avoid the condition of trespass every time an aeroplane flew over private property (Thomas, 1979). A recent survey of the legal and administrative controls on the use of underground space carried out by the International Tunnelling Association found that, with a few notable exceptions, most countries had similar laws governing the ownership and regulation of underground space (ITA, 1990).

The presence of valuable minerals or fluids in the ground considerably complicates the issues involved. To encourage the recovery of valuable minerals, mineral rights can be sold to another party than the landowner who then has the right to carry out mining to recover the minerals. This has led to many lawsuits about damage to the land surface caused by mining and who might own the underground mined-out space left following mineral recovery. Fluid resources beneath property present even more difficult issues since the resource is not fixed in place and can move across property boundaries during pumping for recovery.

Although such issues surrounding property rights for underground space are of general interest to this study, the principal issue of concern in this report is whether underground space beneath public rights-of-way has its own intrinsic value which should be taken account of in decisions about how such space should be used for the public "good."

The monetary value of most land and other resources in the U.S. are determined by the price at which the resource will trade. The value is affected by the desirability of a particular location, the economic potential of the land or its location and the effect of any government restrictions or incentives which may affect the use of the land. Since the public land used for street and highway right-of-ways is seldom traded, its value is usually not as readily determined.

One can assume, in general, that as the value of tradeable land increases, the intrinsic value of adjacent public or non-tradeable land also increases (this relationship being modified by the extent to which the public land is necessary for access, service or amenity to allow the private land to hold its value). As the price of land has risen rapidly, some major cities of the world (notably in Japan and southeast Asia), interest has been generated in minimizing costs for new facilities or generating additional economic returns by utilizing underground space beneath both public and private land.

A 1978 World Bank paper reports that the issue that the price of land is "too high" or is rising "too fast" is a common complaint in cities with limited land area. The reports states that *"....if one retains the same boundaries of a city and if that city is growing, the assertion that average land prices are increasing rapidly is neither surprising nor very interesting.* ***Such increases are necessary for the efficient allocation of space."*** *(World Bank, 1978, p 67).*

The relationship that price plays in the conservation and efficient allocation of a resource is an important one. As land in a city becomes more expensive and space for new facilities more scarce, the waste of space or land in inefficient allocation carries with it a loss of "opportunity cost." Again, from the World Bank report:

> *"The cost of land plays an important role in many decisions by both governments and private agents. In order to delineate the consequences of decisions to use land for specified purposes, one must measure costs in terms of the output of useful goods and services that would be foregone; this is then the true cost or opportunity cost of the land." (World Bank, 1978, p73)*
>
> *"The critical attribute of land that distinguishes it from most other resources is that, with minor exceptions, it is non-reproducible. If land is extraordinarily valuable in the center of a city, one cannot devote resources to produce more of that valuable land; amount must be taken as given. The only recourse is to make different uses of the existing stock of land.* ***Hence there is the desiderata that land should be employed in its most valuable use"*** *(World Bank, 1978, p73).*

In a discussion of the interaction of project and land opportunity costs for an imaginary new port in a developing country, the World Bank observes that land in the area of the port which had a low value prior to port construction will sustain a large rise in value when the port is finished. *"Thus, there are two opportunity costs of land -- one without the project and one with the project completed."* The question of whether the port is worthwhile or should be at that location is answered using the without-project opportunity cost of the land. The other question of whether the port has the right amount of land also must be answered because there may be technologies which can trade land for additional capital. In this tradeoff, *"one should make the port compete with other with-project land uses."* The first decision is a decision on a "lumpy" investment. In the second case, a "marginal" investment of additional land versus additional capital cost is being considered. *"In principle, one should find the most efficient configuration of the port before asking whether it is worthwhile to build it."*

The above general comments on utilizing land effectively as a resource and maximizing its opportunity value can now be related to how we make decisions about the utilization of underground space - especially beneath public rights-of-way.

In a study of the value of urban underground land, Pasqual and Riera (1990) state:

> *"A great deal of resources are devoted to implementing a whole variety of projects in subsurface land. Studies are usually undertaken to identify the optimal allocation of those resources. Thus, in the decision making process, public administration takes into account all sorts of costs and benefits in order to achieve the best cost effectiveness of the investment. However, there seems to be one relevant cost constantly ignored in such studies: the price of the underground land consumed by the project."*

Regarding the reasons that the value of subsurface land has been ignored, Pasqual and Riera suggest:

- There is no specific market for subsurface land
- Developers usually ignore the opportunity cost of additional underground development
- Rights to underground land are bought and sold with the rights to surface land area and thus there is no financial link to the use or misuse of subsurface space
- Historically, the expectation of the need for using underground space was small compared to the amount that existed and underground space was thus usually treated as a "free good"
- Utilities were often granted free use of the space beneath public streets on the basis of public good and a lack of competing demands for the space
- Because there is no specific market, the price of underground space is not obvious
- If the price is not obvious, it is difficult to include the value in cost-benefit analyses

If the value of underground space is not considered in cost-benefit analyses involving underground facilities, the analyses may not provide the optimal solution among several alternatives or the correct answer to whether a project has a net benefit or cost. Of particular relevance to utility placement is that more of the resource of underground space may be consumed than is justified when there are competing technologies or configurations available which use less underground space overall or less valuable underground space at greater depths. In the absence of strict planning controls, the treating of underground space as a "free good" can and has resulted in a chaotic use of the underground. In Tokyo, city planners are looking to layers of underground space at depths of 50 m or more to find zones which are clear enough from existing structures to allow substantial new infrastructure facilities to be built. Perhaps, as in all major cities, this need to go deep for new facilities could be mitigated with better long-range planning and better accounting of the value of the resource usurped by earlier structures.

2.2 Value of Land in Public Rights-of-Way

It is perhaps of interest to estimate in broad terms what the total value of the land in public rights-of-way might be in a major city even though that value could never be realized in direct sale because access and services are necessary for the land to have significant economic value. Localized values are important, however, if land in the public-right-of-way is sold or traded with regard to a specific development. In small parcels, the value of the public land should approach the value of the adjacent private land.

Consider a hypothetical downtown city grid - as illustrated in Figure 2. A one-square block area with a block size of 100 m by 100 m (330 ft. by 330 ft.) together with the appropriate portion of 21.4 m (70 ft.) wide rights-of-way which separate the blocks is shown in the shaded portion of Figure 2. This shaded portion is made up of 10,117 m^2 (108,900 ft^2) of block area and 4,747 m^2 (51,100 ft^2) of street right-of-way. If the value of the public right-of-way were assumed to be equal to the adjacent private property, then the value of the public land area would be 47 percent of the value of private land area for the single block. If the value of land in the downtown area is assumed to be \$4.65 per m^2 (\$50 per ft^2) , [the estimated 1988/89 market values of 7 downtown city blocks in Minneapolis considered for a new Hennepin County Safety Facility were \$10.2 million, \$12.9 million, \$10.7 million, \$5.4 million, \$15 million, \$4.7 million and \$6.3 million respectively - all representing higher values than the figure chosen] then the value of the block itself would be \$5.45 million and that of the adjacent right-of-way \$2.56 million.

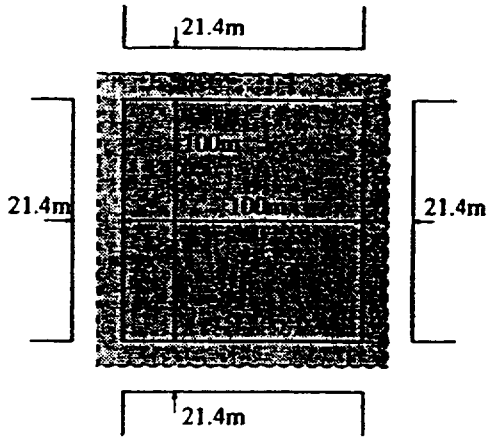


Figure 2 Plan of Downtown City Block

Over a downtown area of 2.59 sq. km (1 sq. mile), the total value of the public right-of-way would be approximately \$446 million (\$172 million per sq. km.). For residential blocks with an average block size of 152 m by 91 m (500 ft. by 300 ft.) and 15 m (50 ft.) rights-of-way (see Figure 3), the block area is 13,935 m^2 (150,000 ft^2) and the associated right-of-way area is 3,948 m^2 (42,500 ft^2). If an average value of \$5 per ft^2 were taken for residential blocks (equivalent to a lot price of \$37,500 for a lot 15 m by 45 m (50 ft. by 150 ft.)), then the above assumptions would lead to value of the public right-of-way in each square kilometer of residential area of \$11.89 million (\$30.8 million per sq. mile). Taking the City of Minneapolis (152 sq. km. or 37,568 acres in total area - City of Minneapolis, 1981 - see Table 1) as an example for which the above assumptions are reasonable , the total value of public rights-of-way could be said to be as high as \$2.2 billion. This figure is derived from taking a downtown area of 2.59 sq. km. at the \$4.65 per m^2 land value, the remaining area of commercial and industrial properties (14.6 sq. km. at \$0.93 per m^2 and all remaining areas (107.6 sq. km.) including residential areas (53.6 sq. km.) but excluding water (9.5 sq. km.) and social-cultural (17.7 sq. km.) at \$0.46 per m^2. Multiplying these areas by the assumed average values for public right-of-way in each square kilometer respectively gives a total value of \$2.23 billion.

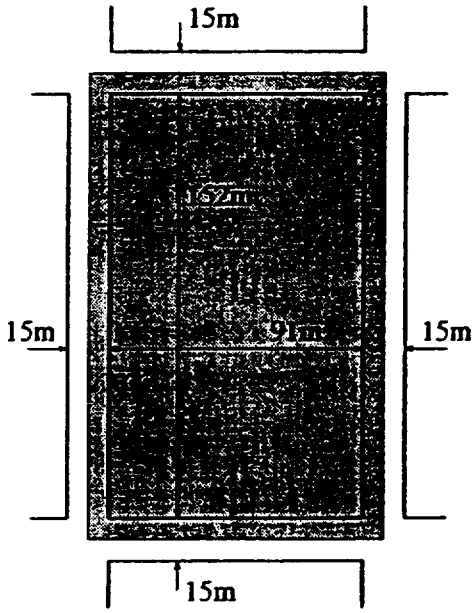


Figure 3 Plan of Residential City Block

Using the area of streets and alleys in the 1981 report (35.9 sq. km.) the figure of $2.2 billion would imply an average land value for the streets and alleys of $61 per m^2 or $5.70 per ft^2.

Table 1 Distribution of Land Utilization in Minneapolis (1981)

	Sq. Km.	Percent of Total
Residential	53.59	35.0
Commercial	9.26	6.0
Industrial	7.93	5.0
Social-Cultural	17.69	11.0
Transportation	4.59	3.0
Streets and Alleys	35.90	23.0
Miscellaneous	0.97	0.6
Utilities	0.21	0.1
Vacant	3.31	2.0
Water	9.47	6.0
Other	9.08	6.0
TOTAL	152.04	

Includes recreation, open space, educational uses and cemeteries
Source: "State of the City 1981, "Minneapolis Planning Department, December 1981.

2.3 Discussion on the Monetary Value of Underground Space

The value of land, of course, varies from country to country, city to city and from city to small town. In some parts of the world, urban land prices have risen so high as to severely curtail the provision of new infrastructure which cannot be accommodated within existing public rights-of-way. Tokyo, as the extreme example, has localized land prices which reached $500,000 per m^2 ($50,000 per ft^2) in 1988 (Kuwabara 1988). This should not be considered representative of densely-populated major business centers, however. Hong Kong with much less land area and much higher land use densities had a maximum land value of $14,000 per m^2 ($1,400 per ft^2) in 1989 (Vail 1989) and downtown New York had a maximum land value of around $25,000 per m^2 ($2,500 per ft^2) in 1989 (Downes 1989).

The cost of land in Tokyo has reached the point where the cost of land required for a new public works project can exceed 95 percent of the total cost of the project. Such high land prices cause a substantial dislocation in the way public agencies think about the provision of new facilities. Legislation has been introduced into the Japanese Diet to alter land ownership under Tokyo. The central element of the legislation would be to make underground space below 50 m (164 ft.) public

property and thus avoid the separate condemnation and purchase of easements beneath private land. Also, one finds in Japan many shopping centers and public parking facilities constructed beneath the public streets at major commercial centers. Such construction allows the provision of needed facilities in locations where new surface land is unavailable and where the cost of private land is prohibitive.

Despite the ability to avoid the cost of the purchase of private land, however, the construction of major new facilities beneath streets in heavily-used commercial districts is fraught with many difficulties - disruption to the existing neighborhood during construction, relocation of existing utilities, etc. and damage to streets. These questions will be addressed later in the report but in this chapter, one issue will be focussed on - does the fact that public agencies and utilities do not have to pay for utilizing the public space beneath rights-of-way mean that the space should be administered as if it has no value and no impact on the long-term development of the urban area. In effect, this is what often happens at present - current projects to be placed beneath streets are laid out and constructed on the basis of avoiding existing utilities, maintaining access for future repair, minimizing damage to boulevard trees, and where possible following utility layout corridors which have been set up to reduce future utility conflicts and accidental damage due to unknown location. These issues present difficult problems to resolve, especially in older portions of cities with narrower streets and a longer history of utility development. The nature of the decisions currently made however do not consider substantially alternate uses of the space which may be desirable later in the growth of the urban area.

The alternate uses may include:

- Underground pedestrian connections - these require less change of elevation for pedestrians than skyways across streets, they do not visually interfere with the aesthetics of the existing streetscape and they make a more convenient circulation system for cities with an underground transit system. The reason pedestrian tunnels are not built more often has mainly to do with the expense of relocating the existing utilities to accommodate the tunnel. Other reasons may include poor personal security in uncontrolled pedestrian tunnels and the greater ease of wayfinding in a skyway system.

- Public or private facilities needed in a particular area for which there is no longer any private land available - this is less of a problem in U.S. cities than in Japan or Europe because land costs are lower, there are fewer historical districts which require preservation, and planning restrictions are generally less severe. These needs can result in parking structures and shopping centers beneath streets and plazas in central cities.

The value of underground space beneath private land depends on several factors:

1. Are mineral resources of value involved?
2. Will normal use of the surface land be affected?
3. Will the construction of future structures be limited by any underground use?
4. How accessible is the underground zone?
5. Is it likely that this zone would or could be developed by the current owner?
6. What is the cost of developing the underground zone?
7. Is the actual underground space utilized dependent for its stability on an undisturbed zone of ground around the opening?
8. Is there an psychological impact on land value from partial undermining?

If the issue of mineral resources is neglected, factors 2 through 5 indicate that the value of underground space should tend to decrease with increasing depth and decreasing impact on surface uses. If the land surface is effectively usurped, then one would expect the cost of the underground space to equal the full cost of the surface land required. With decreasing impact on the current and future uses to which the surface land may be put, the loss in land value to the owner of the surface land diminishes. Such a decreasing impact may be expected to occur with increasing depth. Also, the owner is less likely to want to or to be able to develop the underground space at greater depths. For the developer of the underground space, the principal issues are 4 and 6. The underground space is not useful if it is not accessible and the price the developer is willing to pay for the right to the space will be related to the cost to develop the underground zone in question. If other costs are fixed, cheaper construction costs will allow a higher price to be paid for the space. Construction costs generally will tend to increase with depth below ground reinforcing the other factors mentioned above. This will not always be the case, however. In cases where different geological formations provide substantially different costs for excavation and support of underground openings, costs to construct underground space may be less in favorable geological formations at greater depth than in poorer shallow conditions. This lower construction cost may result in an increase in the value of underground space within this favorable zone. An analysis and discussion of the interaction between land cost and the cost/benefit analysis for underground versus aboveground buildings is provided in Carmody and Sterling (1993).

When considering the cost of an easement or land purchase for underground development it is important to take into account any additional ground or land area required for the support of the underground excavation made. Many underground structures are designed based on the interaction of the structure and the surrounding ground and it may not be possible to build a new structure immediately adjacent to the previously constructed facility without extensive strengthening work. This restriction on the future use of the ground surrounding the current use should be included in calculating the value of the easement and it should be clear whether the value assigned is for the actual area occupied below ground or the total area necessary to maintain the stability of the structure.

There also may be cost impacts on the value of surface land due to underground easements which are not as readily determined. When easements are created or underground structures exist beneath a

DRAFT REPORT

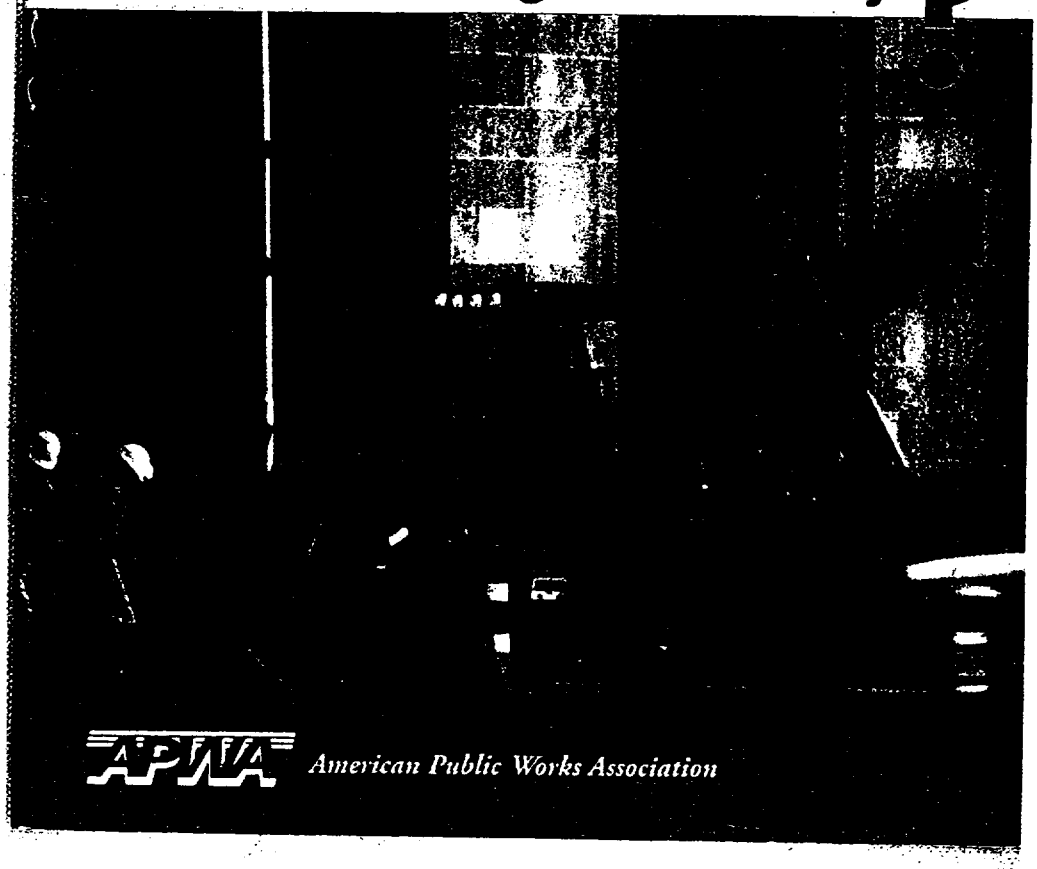
FAIR MARKET VALUE ANALYSIS FOR A FIBER OPTIC CABLE PERMIT IN NATIONAL MARINE SANCTUARIES

AUGUST 2001

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
NATIONAL OCEAN SERVICE
NATIONAL MARINE SANCTUARY PROGRAM

B

the Public Right-of-Way?



American Public Works Association

With fiber optics replacing copper, and with packet switching replacing mechanical switching, with the impending marriage of television, the Internet and communications, the demand for instant access to information is exploding. All that is needed is the capital to build the systems, and with this economy, the funds are there. Where must all this construction go? It must go under the common thread that connects all people with all places–your roadways...."

To put it bluntly, it is not in a municipality's best interest to prevent or impede the deployment of the infrastructure needed to support the Information Age. If people and businesses cannot obtain access to the fiber optic and wireless systems that carry the Information Age's data streams, they will relocate to where they can.

Benefits of Being an Information Age Municipality

Businesses and individuals are getting on the Internet in almost exponentially increasing numbers. As technology improves, increasing amounts of information are being transmitted via "broadband" conduits. Cable TV, telephone, and Internet access packages are becoming more common as the technical ability to carry larger amounts of data per unit of time is improved. Where data transfer rates were measured in hundreds per second in the 1980s, in the thousands and tens of thousands per second in the 1990s, modern technology requires that these rates be measured in the millions per second. This exponential increase in data transfer has produced a parallel increase in the commercial and personal demand for information services, and as these services become more sophisticated they become more attractive to new and existing users. While questions involving the authority of local governments to tax Internet purchases have yet to be settled, the economic advantages derived from e-business transactions of local merchants are positive.

Online contacts between local government and citizens have proven to be both cost effective and very well received by citizens. Facilitating the ability of citizens to obtain permits, ordinances, standards and other municipal documents via the Internet reduces service requirements and costs in City Hall. Larimer County, Colorado, has a virtual county courthouse where citizens can conduct the activities that for some once required journeys of up to several hours. Large and small cities have adopted Internet technology to conduct business and provide citizens with real time information on road conditions, weather and municipal work activities.

Successful Right-of-Way Management: Possible and Absolutely Necessary

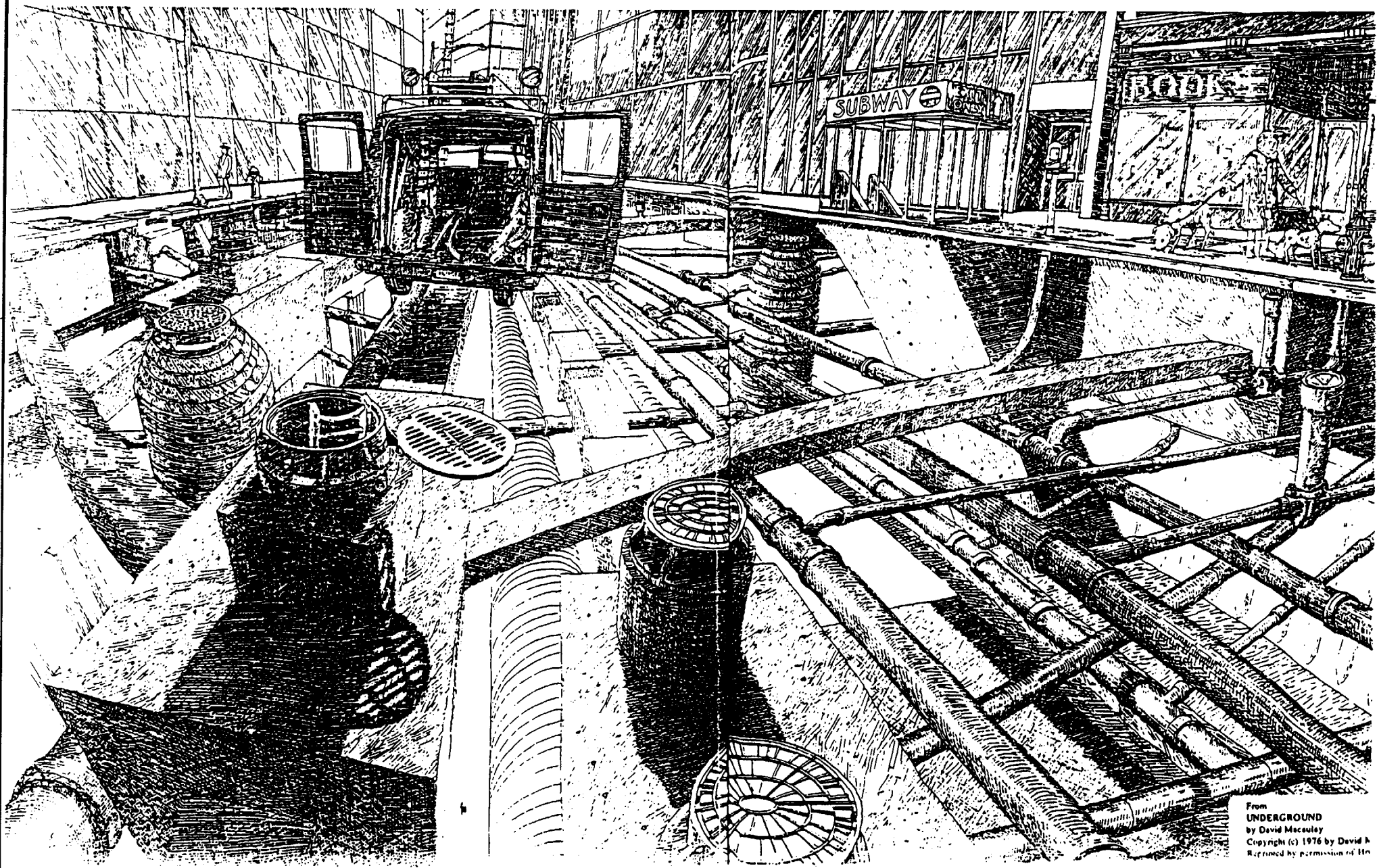
Horror stories literally abound on municipal streets being cut repeatedly by firms installing new telecommunications lines...on streets being dug up by utilities performing routine upgrades to buried facilities shortly after streets have been repaved...on dig-ins of water, gas and sanitary sewer lines. Beaches have had to be closed due to water pollution and public health hazards caused by cuts in sanitary sewer lines. Pictures of major downtown areas awash in water from cut mains make the national television news, as do gas main explosions that injure or kill numbers of individuals. All of these represent the bad and ugly side of failure to follow infrastructure protection procedures or laxity in their enforcement.

In November 2000 a jury in Texas awarded AT&T $1.2 million in compensatory damages and $350 million in punitive damages in a lawsuit against Qwest, Inc. This suit resulted from cable cuts in Hays County, Texas, in September, November and December 1997 which, in the jury's opinion, resulted from Qwest's using "unqualified, and inadequately supervised subcontractors." While this suit only involved communications companies, it is not hard to envision a municipal government being brought into a lawsuit for its "failure to adequately manage portions of the public right-of-way and thereby contribute to" the damage of utilities. A community's best defense against such a scenario rests on a reasoned and proactive approach to managing its public rights-of-way.

The good side of public right-of-way management is that when public rights-of-way are managed, the horror stories tend not to happen and, if they do, damage and economic loss is minimized.

In the City of Minneapolis over 21,000 pavement cuts within the public right-of-way were made from 1995 to 2000, and ***less than one-tenth of one percent of these cuts failed and required replacement.*** What is the "secret" of Minneapolis' success? There is no secret! The "secret" is a well thought out, well documented and well administered program for management of

OPTIMUM ORGANIZATION OF URBAN SUBSURFACE



From
UNDERGROUND
by David Macaulay
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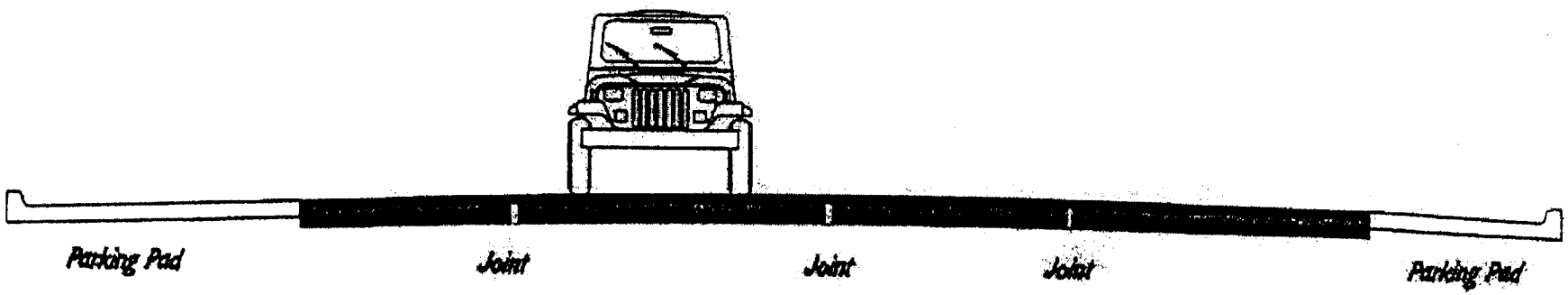
TYPICAL SUBSURFACE FACILITIES

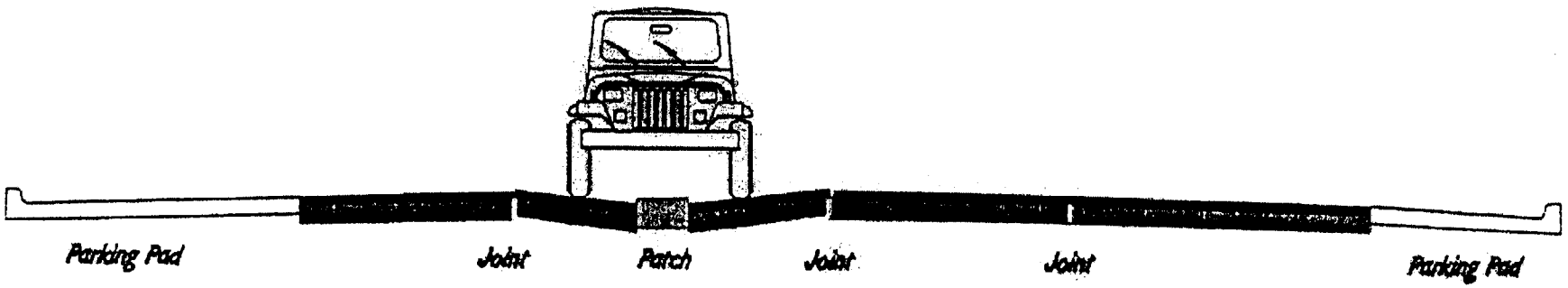
Source: *U.S. Department of Transportation, FHA Highway/Utility Guide, June 1993.*

Item	Typical Dimension	Typical Materials	Typical Cover	Typical Locations	Other Clues
Water Mains	100 to 1200 mm (4 to 48 in.)	Steel, cast iron, plastic wood, concrete, asbestos, cement, stone work	3.0 m (to 10 ft)	Under street and sidewalks	Manholes, shut-off valve plates, hydrants, knowledge that buildings use piped-in water, water company records
Water Distribution Lines	12 to 150 mm (0.5 to 6 in.)	Steel, cast iron, plastic, asbestos, cement, copper	2.4 m (to 8 ft)	From streets toward buildings	Shut-off valve plates, knowledge that buildings use piped-in water
Gas Mains	50 to 750 mm (2 to 30 in.)	Steel, cast iron, plastic	1.8 m (to 6 ft)	Under streets and sidewalks	Manholes, shut-off valve plates, knowledge that buildings use piped-in gas, gas company records
Gas Distribution Lines	12 to 150 mm (0.5 to 6 in.)	Steel, cast iron, plastic, copper	1.5 m (to 5 ft)	From streets toward buildings	Shut-off valve plates, knowledge that buildings use piped-in gas, visible service entrance or meter, gas company records
Sewer Mains	150 to 1200 mm (6 to 48 in.)	Cast iron, vitrified clay, asbestos cement, plastic coated steel, bituminized fibre, concrete, stone work	6.1 m (to 20 ft)	Under streets and sidewalks and along property lines	Manholes and cleanout openings, knowledge that buildings are served by sewers, lift stations, municipal records
Sewer Lines	75 to 150 mm (3 to 6 in.)	Cast iron, vitrified clay, asbestos cement, plastic coated steel, bituminized fibre, concrete	1.8 m (to 6 ft)	From buildings toward mains	Cleanouts, traps, knowledge that buildings are served by sewers
Electric Power Lines in Conduit	Conduit: 25 to 125 mm (1 to 5 in.) Cable: 25 to 50 mm (1 to 2 in.)	Conduit: asbestos cement, steel, concrete, plastic Cable: insulated copper or aluminum	1.5 m (to 5 ft)	Under streets and sidewalks and along property lines	Manholes, transformers, visible connections to aerial plant, electric company records
Buried Power Lines	12 to 50 mm (0.5 to 2 in.)	Insulated copper or aluminum	13.1 m (to 4. ft)	Along streets, under sidewalks, along property lines, toward buildings	Visible connections to poles, to buildings, to underground transformers, electric company records
Telephone Cable in Conduit	Conduit: 90 to 125 mm (3.5 to 5 in., commonly 4 in.) 100 mm, Cable: 10 to 100 mm (0.3 to 4 in.)	Conduit: plastic, clay, asbestos, cement, steel, concrete, wood Cable: insulated copper or aluminum, lead sheath, coaxial	3.6 m (to 12 ft)	Under streets and sidewalks, along property lines	Manholes, visible connections to aerial plant, telephone company records
Buried Telephone Cable	12 to 100 mm (0.5 to 4 in.)	Insulated copper or aluminum, coax	1.2 m (to 4 ft)	Along streets and roads, along rights-of-way	Pedestals, closures, visible connections to aerial plant, telephone company records
Buried Wire	10 mm (0.3 in.)	Insulated copper, or aluminum	0.6 m (to 2 ft)	Between buildings and cables	Pedestals, service entrances on buildings, telephone company records
Cable TV Cable	1.3 cm (0.5 in.)	Insulated copper, or aluminum	0.5 m (to 2 ft)	Between buildings and cables	Service entrance on buildings, visible connection to distribution, cable TV company records

Source: *APWA Subsurface Utility Facilities Detection Techniques and Detection Devices.*

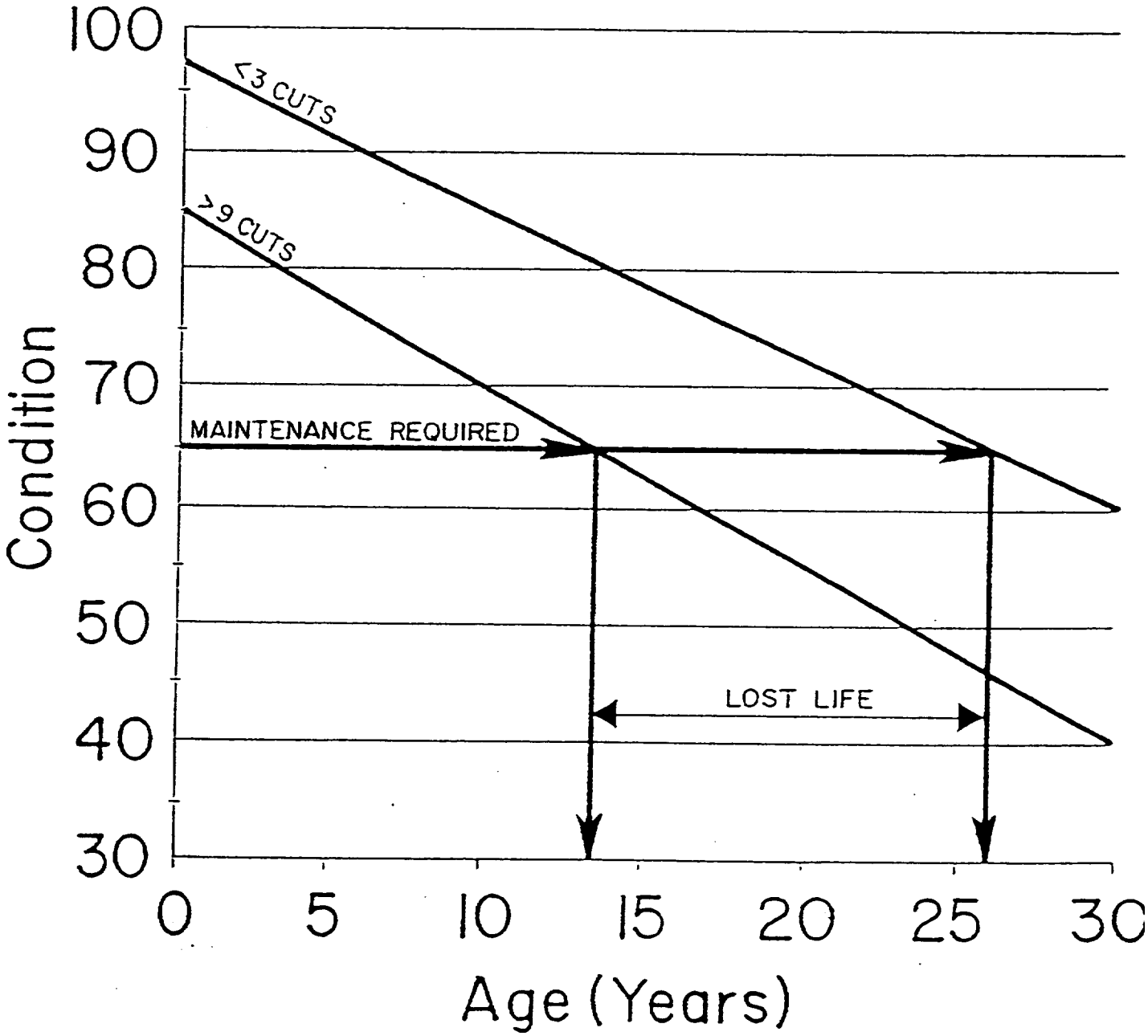


Cross-Section of Typical Street



Cross-Section with Patch

PAVEMENT DETERIORATION



DAMAGES FROM CONTRACTOR INSTALLING FIBER OPTIC CABLE

Sorted by Date Billed

Date Billed	Amount	Date of Damage	Damage	Contractor	
1/29/1999	$995.63	12/15/1998	Sewage Flow Monitor Repair	MONTGOMERY WATSON	
Total 1999	**$995.63**				
3/24/1999	$776.08	3/3/1999	15" Sewer Main Repair	PAVE-CON UTILITY	
04-11-99	$2,675.80	03-05-99	27" Sewer Main Repair	CHAMPAGNE-WEBBER	TxDot
09-30-99	$1,130.05	03-08-99	Lateral Sewer Line Repair	TEXAS STERLING	
06-18-00	$387.24	03-31-99	1" Water Main Repair	STARLING RICHARDSON	
06-21-99	$2,567.64	04-19-99	12" Water Main Repair	PRECISION UNDERGROUND	
06-28-99	$55.54	04-20-99	Sprinkler System Repair	MONTGOMERY WATSON	
06-17-99	$602.06	04-21-99	8" Water Main Repair	SPRING VALLEY CONST.	
06-17-99	$4,677.77	04-22-99	18" Water Main Repair	H.B. ZACHRY	TxDot
06-25-99	$5,711.92	06-16-99	Lateral Sewer Line Repair	GRAMMERCY-BRISTON PT	
08-06-99	$5,073.06	06-17-99	18" Water Main Repair	R-COM, INC.	CSDI
08-06-99	$482.78	06-29-99	Damaged Service Line	L & S PLUMBING	
07-07-99	$198.17	06-30-99	8" Water Main Repair	TEJAS TRENCHING	AT&T
07-07-99	$232.64	06-30-99	8" Water Main Repair	McMAHON CONTRACTING	
07-12-99	$44.43	07-06-99	Meter tail broken by contractor	HOUSLEY COMM.	GTE
07-20-99	$1,428.71	07-13-99	6" Water Main Repair	R-COM, INC.	CSDI
07-27-99	$6,270.28	07-20-99	8" Water Main Repair	BORE TECH OF IRVING	MM
06-17-99	$743.62	07-21-99	8" Water Main Repair	LLANO CONSTRUCTION	CoServe
08-12-99	$5,706.11	07-27-99	12" Water Main Repair	FISHEL	SWB
08-10-99	$10,742.68	07-27-99	24" Water Main Repair	M & P CONSTRUCTION	GTE
08-06-99	$804.19	07-28-99	8" Water Main Repair	LLANO CONSTRUCTION	TXU
09-02-99	$3,797.56	08-16-99	12" Water Main Repair	FISHEL	SWB
09-30-99	$1,005.44	09-22-99	18" Water Main Repair	CHRISTY DRILLING	
10-06-99	$485.16	10-05-99	8" Water Main Repair	UTILITY CONST	
10-05-99	$682.48	10-22-99	Meter and Meter Box Replaced	EXTREME RESIDENTIAL	TXU
11-16-99	$1,904.61	10-28-99	Lateral Sewer Line Repair	INSTITUFORM	
11-15-99	$834.43	11-03-99	8" Water Line Repair	JULIAN BARRY	
05-19-00	$3,336.11	11-04-99	Meter Box Replacement 11/4/99-4/12/	LANCER'S SQUARE	
11-08-99	$4,943.72	11-04-99	18" Water Main Repair	NORTHERN PIPELINE	TXU
11-17-99	$647.53	11-16-99	8" Water Main Repair	MODERN EXPLORATIONS	GTE
12-20-99	$452.16	12-14-99	Meter & Meter Box Replaced	SINACOLA	
12-31-99	$156.37	12-29-99	2" Water Line Repair	HOUSLEY	GTE
Total 1999	**$68,556.34**				
02-03-00	$730.59	01-31-00	8" Water Line Repair	CIRCLE J BORING	
02-08-00	$102.48	02-04-00	3/4" Service Line Repair	TRENCHMASTERS	Mastec
05-04-00	$1,751.73	02-29-00	Main Break Repair	GTI	AT&T
05-20-00	$1,529.07	03-21-00	8" Water Line Repair	AF EXCAVATING	
06-02-00	$4,901.80	05-13-00	12" FH Water Line Repair	MASTEC	GTE
06-02-00	$9,803.53	05-13-00	12" FH Water Line Repair	MASTEC	GTE
06-02-00	$86.19	05-17-00	3/4" Service Line Repair	FISHEL	SWB
07-05-00	$137.21	06-02-00	8" Water Line Repair	R&S BACKHOE	
07-10-00	$2,655.28	06-20-00	8" Water Line Repair	LLANO	TXU
08-12-00	$8,698.69	06-22-00	12" Main Water Line Repair	M&L UTILITIES	SWB
08-03-00	$1,161.65	06-28-00	12" Water Line Repair	TANDY & TANDY	GTE
07-12-00	$1,125.45	07-09-00	Sewer Service Line Repair	MASTEC	TXU
08-03-00	$8,465.49	07-13-00	24" Sewer Line Stoppage	North texas Municipal WD	
08-03-00	$103.57	08-02-00	FH Damage due to misuse	M&L UTILITIES	SWB
08-07-00	$1,861.29	08-05-00	8" Sewer Main Repair	MASTEC	TXU
09-12-00	$338.61	08-22-00	Water & Sewer Line Repair	HOUSLEY	GTE
09-12-00	$3,417.57	08-22-00	8" Water Main Repair	M&L UTILITIES	SWB
09-14-00	$538.17	08-25-00	12" Water Line Repair	TEXAS ELECTRIC CONST.	TXU

Indirect Costs of Utility Placement and Repair Beneath Streets

FINAL REPORT

Prepared by

Raymond L. Sterling, Ph.D., P.E.

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August 1994

Submitted to

Minnesota Department of Transportation
Office of Research Administration
200 Ford Building, 117 University Avenue
Saint Paul, MN 5155

Chapter 3
Indirect Costs of Utility Work

3.1 Background

As explained in the introduction, the purpose of an analysis of indirect cost of utility work is to minimize the total economic costs to the community as a whole. In a situation where the indirect costs are significant, the method of work which is most cost-effective for the community as a whole may not be the method with the lowest first cost. Basing the choice of the speed of working and the selection of construction technique on both direct and indirect costs does not increase the total cost to the community of the project. Instead, it avoids one segment of the community being unfairly penalized with the imposition of the social costs while another group pays less than the true cost of the work.

3.2 Costs to be Considered

The costs to be considered will vary from situation to situation depending on which factors are important in terms of the potentially significant indirect costs. The listing of possible costs given below is taken from the work of the University of Manchester Institute of Science and Technology (UMIST) in the U.K. The direct costs of utility work include:

- Excavation and backfill
- Pipe and pipelaying
- Pavement reinstatement
- Temporary utility service diversions
- Traffic diversions and traffic control

The indirect costs of utility work include:

Traffic
- Traffic diversions and delays
- Increases in vehicle operating cost
- Loss of accessibility and parking spaces
- Delays to public transport

Environmental
- Increased noise
- Increased air pollution
- Increased construction mess
- Increased visual intrusion

Safety

- Decreased safety for motorists
- Decreased safety for pedestrians

Economics

- Loss of trade to local businesses
- Damage to other utilities
- Damage to street pavement
- Increased workload on other government agencies or utilities

The cost of public transport disruption can be further broken down as:

- Additional route mileage
- Delay-time costs
- Shuttle/relief
- Extra walk time
- Information and inspectors time
- Loss of revenue
- Impact of bus traffic on diversion routes

In cities with heavy bus usage on critical routes, the costs of public transport disruption can be very significant. In one analyzed case in the U.K, a major sewer collapse resulted in an 18 month road closure requiring a route diversion of 7 km and 20 minute delays during peak periods. The estimated costs to London Transport and passengers amounted to UK£3 million (Probert, Holmes and Flemons, 1982 in Bristow and Ling, 1989).

A flowchart for the inclusion of societal costs in construction method selection (including whether such an analysis is necessary) has been prepared by Vickridge et. al. (1992) and is shown in Figure 6.

D

D.C. Cable Trenches Maim More Than Just Streets

By Lyndsey Layton
Washington Post Staff Writer

Gashed tires, bent wheel rims and a 1904 mansion that is coming apart at the seams. The utility trench digging in the District is exacting a private toll being paid quietly in repair shops and homes around the region, motorists and property owners say.

"You got to dodge lumps, bumps and humps," said Charisse Ratcliffe, 40, who has twice paid $100 to realign her 1988 Nissan Pulsar since the summer, when work crews began carving trenches through her Capitol Hill neighborhood. "We pay enough as it is in taxes. Now we got to pay to fix the car."

About 100 people have filed claims with the District since October, saying they've suffered damage because of the sorry state of city streets.

Hazards to vehicles lurk not only from open trenches but also from the metal plates that cover them. And the temporary repairs of the trenches pose further danger, because they are either ribbons of loose asphalt that quickly dissolve into potholes or are exposed concrete that is sharply recessed in the asphalt road.

On his way to work last month, Neil Torda, 30, drove his Jeep Cherokee over a utility trench on Connecticut Avenue. Like many around the city, it was filled with white concrete two inches lower than the surrounding asphalt road. The impact of hitting the depression broke the motor that runs his windshield wipers, he said. It was

See STREETS, *B5, Col. 1*

PHOTOS BY GERALD MARTINEAU—THE WASHINGTON POST

The School for the Arts in Learning, 16th and L streets NW, is near a road that has undergone months of tear-ups.

Street Trenches Affect Property

STREETS, *From B1*

raining. "I had to park the car and take Metro," said Torda, who spent $150 in repairs. "I just moved here from North Carolina. I don't get this. They keep paving the roads and tearing them up."

Last week, William Hall, 41, was heading east on L Street near the new convention center site when he drove his 1999 Dodge Ram conversion van straight into an open trench being dug by a work crew. "They had a flagman, trying to ease you through the intersection, but my tire just sank right into it," Hall said. "There was a loud 'fumph!' And I just gunned it to get out of there." The casualty was a chunk of the van's fiberglass running board. A replacement will cost about $600, Hall said.

D.C. Mayor Anthony Williams (D), who said his wife's car also has needed a new alignment, has called a temporary halt to the digging while his administration scrambles to get control of it.

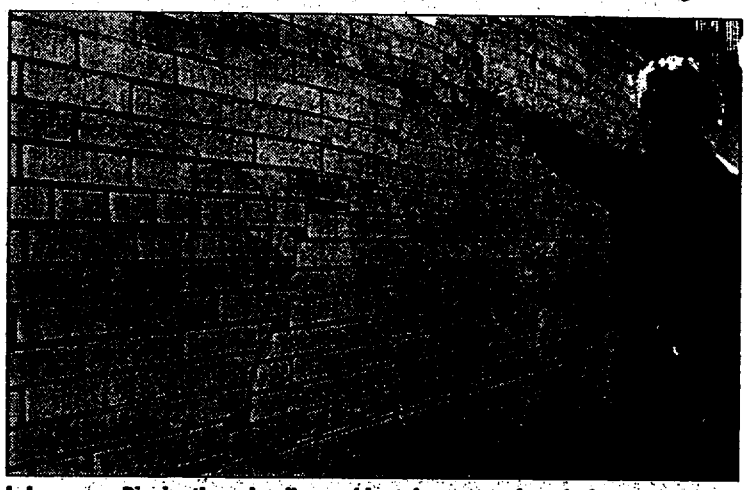
Cars, trucks and bicycles are not the only victims of the digging epidemic.

Day Walters was taking a shower in his house on Nebraska Avenue NW in January when he noticed cracks in the tile. The street outside Walters's home has been dug up repeatedly for more than a year by the utility companies and is now being reconstructed by the city.

"There are cracks in plaster and tile from all the heavy vibration and machinery, from the constant movement of earth," said Walters, who plans to file a claim with the city. "The cracks are needle thin, but they're all over the house and they weren't there before."

At the School for the Arts in Learning at 16th and L streets NW, officials say the fallout from the fiber optics trenching can be read on the walls of the century-old former mansion.

L. Lawrence Riccio, president and chief executive officer of the charter school, said months of jackhammering and pavement breaking along L Street have cracked walls and shifted the foundation.



L. Lawrence Riccio, the school's president, inspects a foundation wall. He says the L Street roadwork has cracked walls and shifted the foundation.

Riccio said the cracks appeared late last fall, when work crews were smashing through asphalt pavement and the concrete road base just a few feet from the school.

"The building was shaking," said Riccio, who has filed claims with the school's insurance company for what could amount to about $100,000 in damage, he said.

Chuck Gavin, a structural engineer hired by the school to inspect the damage, found recent damage on all four floors of the building, which he said is likely due to the trench work.

The block next to the school is among those most frequently dug up by telecommunications and utility companies during the past year, said Linda Grant, a spokeswoman for the Department of Public Works.

District officials say anyone who has suffered property damage from the utility cuts can file a claim with the city corporation counsel's office by calling 202-727-6295. Officials say the utility companies are liable for damage incurred by the roadwork they perform. After logging a claim with the District, the person will be referred to the appropriate utility company.

Since Oct. 1, 98 people have filed complaints about damage resulting from a pothole or other road condition, said Leigh Slaughter, spokeswoman for the corporation counsel's office. Officials could not say yesterday how many of those complaints stemmed from utility cuts or if any have received compensation for damage.

Some car owners laughed at the idea of filing a claim.

"Yeah, right," said Ratcliffe, the Capitol Hill resident. "I filed a claim for potholes, years ago. It went through one ear and come out my foot. The city's not going to pay. But if I owe the government something, they come and find me, sure enough."

Congress is also concerned about the state of the city's streets. The House Appropriations subcommittee on the District has asked Public Works Director Vanessa Dale Burns to come to Capitol Hill to discuss the street cuts. The meeting is expected to take place today or tomorrow.

WIRED NEWS updated 3:00 a.m. 24.Aug.99.PDT

High Bandwidth Bureaucracy

by Joanna Glasner

3:00 a.m. 25.Mar.99.PST

SAN FRANCISCO -- The dozens of Net startups clustered around Third Street should tip off even the most oblivious observer that this is the hub of the city's booming new media industry. If that's not enough, look for the construction crews.

In the past three months, three different telecommunications companies have torn up exactly the same strip of road in almost the exact same spot. Three more companies are lined up to do the same.

"The residents and store owners come out and say: 'You guys, again?'" said Rick Shone, project manager for San Francisco's Underground Construction Company, the contractor that's doing most of the digging.

Everyone from AT&T and MCI to upstarts like NextLink and Level 3 wants to install super-fast fiber-optic lines under the city's entrepreneurial Mecca. The city's attempts to make them spare the streets don't always succeed because of the fierce rivalries among the companies.

In the long run, companies say their state-of-the-art networks will offer local businesses lightning-fast access to video, voice, and data over the Internet. In the meantime, however, city officials say the hum of heavy equipment will carry on.

"We didn't become the most-wired city in the country two years running by not digging up our streets," said Denise Brady, of the San Francisco Department of Telecommunications and Information Services.

Just outside of the Wired News newsroom on Third Street, NextLink and MCI have plowed through. Now, Level 3 Communications, which is building a $10 billion national fiber network, is putting in lines. Others, including Lightwave and AT&T have permits to go next.

And Third Street isn't the only road. Throughout downtown and adjoining neighborhoods, companies are chasing each other to put in their next-generation voice-and-data networks.

Crowding is becoming a concern. The companies have to share the same underground space with sewer pipes, electric wires, water lines, and copper telephone wires.

A lot of San Francisco's wiry netherworld is so densely populated that repair crews are having a hard time finding space to work.
On Third Street recently, a sewer repair crew actually had to work inside a three-by-five foot sewer pipe. They couldn't do the repair from the outside, as they normally would. There was no other room left.

"It's one of those streets where we seriously question if there's room for anybody else," said Vitaly Troyan of the city's Department of Public Works.

Besides crowding, the jackhammers on Third Street wreak havoc with the road itself, distract high-paid programmers and journalists trying to get work done, and close off a major route just a mile from busy downtown San Francisco.

Naturally, the city tries to push the companies to work together. But results have been mixed.

Telcos aren't thrilled at the prospect of hashing out cooperative agreements with their biggest competitors. And since companies themselves cough up the cash for roadwork, the city can't force them to work together.

Instead, permit-granting officials turn to what Troyan describes as "moral persuasion."

"What we try to do is shotgun marriages," he said. "If you're not going to use the same pipes, at least use the same trench."

The city likes to get competing companies with plans to build on the same turf to schedule their work at the same time, or at least in close succession. That way, the street might only get torn up once.

Several cities nationwide have grappled with similar strategies to handle the surge in telecom construction projects. Because it's too soon to tell exactly how much demand there will be for high-speed fiber networks, companies are rushing to get their lines in first and grab an early share of the market.

The cable-laying projects going on now won't be the last. Once all the companies install their backbone networks, they'll have to dig up even more ground when the surrounding buildings actually sign up for service.

"It doesn't matter how high-tech the industry is," said Ed Koops, engineering vice president at NextLink. "You still have to dig in the dirt."

Related Wired Links:

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The Seattle Times

Sunday, January 13, 2002, 12:00 a.m. Pacific

Fiber-optic lines languish under scarred city streets

By Alwyn Scott
Seattle Times business reporter

First of two parts

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Part 2: No rush to join in the faster Net race

The 321 Hair Design salon stands at one of Seattle's busiest intersections. But rather than help business, the heavy traffic has chased away customers for more than a decade.

The traffic is data — billions of Web pages, music files and phone calls — pulsing through fiber-optic cable buried below Seneca Street between Third and Fourth avenues. With the fiber outside her door, Pam Thurston, 321's owner, could have created an online appointment book and beamed in movies for clients.

But the salon isn't wired.

Instead, it lost business as jackhammers ripped up the asphalt to install lines — 28 times since 1990.

"We get absolutely no benefit from it," Thurston says.

Empty pipes

Fiber-optic cable was the bold new promise of the 1990s, designed to link us at cyber speed. Goaded by ambitious forecasts, easy money and deregulation that opened the streets to all comers, telecom companies spent billions of dollars laying millions of miles of fiber cable to slake the thirst for high-speed Internet connections.

But before they could hook the network to their customers, they ran out of money. Today an estimated 95 percent of that cable lies "dark" — completely unused — often just yards from the homes and businesses it was supposed to connect. After paying $1 million a mile or more to build their networks, many telecom companies are going bust and can't afford to wire the "last mile."

The glut of fiber-optic capacity is staggering. A pair of glass strands not much wider than a human hair can carry 10,000 times more data than a conventional copper phone line.

That's enough capacity to easily carry television movies to 10 million homes. Better electronics are expected to bump the capacity to 2 billion homes in a few years, far more than anyone here needs.

"There's a lot of dark fiber out there that may not ever be lit," says Barry Moore, sales manager of

Sprint's Seattle branch. Like most telecom companies, Sprint won't disclose how much of its Seattle network is in use.

The oversupply has caused prices for high-speed Internet connections to plummet nearly two-thirds in three years. In theory that should be good for customers. But in fact, it has put fiber networks further out of reach by making it harder for telecom companies to earn back the cost of a last-mile connection.

In Seattle, a few hundred feet of fiber line from the street to a building can cost $200,000 to install, more than either telecom companies or customers can pay, says Victor Smith, a Seattle salesman for Bloomfield, Colo.-based Level 3 Communications.

"In the old days — two years ago — we would go building to building (making connections) and then advertise to customers," says Chris Heavens, general manager of Electric Lightwave, a Vancouver, Wash.-based fiber provider. "In the current environment, that's not a healthy thing to do."

Payback at current prices could take many years, and few telecom companies have that kind of time.

Bigger crash than dot-coms

The hangover from the late 1990s building boom is hitting the U.S. economy hard.

After growing 17 percent a year from 1995 to 2000, telecom-equipment spending fell 24 percent in 2001, shaving more than a third of a percentage point from the nation's economic growth, according to James Glen, an economist at Economy.com.

Job losses in the industry have climbed into the tens of thousands as companies scale back and go bust. Investors are being punished, too. Telecom stocks such as Nortel Networks and Cisco have crashed like dot-com stocks, but because their value was much greater, they've caused far more pain, accounting for the bulk of stock-market wealth destroyed in the last two years.

Telecom salesmen once scrambled to keep pace with Internet startups and big businesses expanding network use, and they earned six-figure incomes for their efforts. Now they're a cross between Maytag repairmen and financial analysts, waiting for the phone to ring and carefully calculating whether a job will justify the cost of hooking up a customer.

"In all situations you see other companies in, vying for the same business you're vying for," says Smith of Level 3, which now often sells capacity to other providers rather than wiring buildings itself.

At the peak of the building frenzy in 2000, Seattle issued 1,126 permits to dig up streets and install fiber. Today, more than 30 companies have put cable in the city; at least 16 lines snake through downtown Seattle. Nine pass Microsoft's Redmond campus.

Two years ago, just weeks after the state paid to repave Aurora Avenue North, a telecom company called Global Crossing started tearing up the asphalt to install a fiber line that would eventually link Seattle to Asia. To avoid repaving the entire road, Global Crossing bored underneath it, like a gopher, surfacing every 600 feet or so.

Larry Walters, who lived at the Mirabella apartments on Aurora at the time, said the nocturnal drilling

sounded like a garbage disposal reverberating in an auditorium.

On Seneca Street, Thurston and her neighboring business, the Hotel Seattle, watched in horror as crews opened the street 14 times in a two-year stretch to connect with a nearby Qwest office. A set of lines once was laid across steam pipes, which melted the sheathing. The solution: open the streets again to move them.

"The city could have planned better," says Doug Neyhart, general manager at the hotel. He looks out at 21 manholes that litter the pavement. "Instead we got a street that's a mess."

The city says its hands were tied. Unlike cable-television service, which was franchised to one or two companies, the 1996 telecom deregulation required local governments to accommodate any company that wished to install fiber.

Costly trench in Bellevue

Now some telecom companies are going bust, leaving their networks unfinished.

A group led by 360 Networks, based in Vancouver, B.C., fought hard and paid an estimated $10 million to build a loop through downtown Bellevue last year. It opened a 16-foot-wide trench at the busy intersection of Bellevue Way and Northeast Eighth Avenue as it searched for a clear path through a mass of pipes there. At Kamber Road, it bored underground for 2,000 feet to avoid a stream and loose soil. The tunnel collapsed and had to be dug again.

After all that, the group stopped short of pulling fiber cable through the entire loop. 360 Networks filed for bankruptcy protection last June and says none of the fiber in its loop is lit. Ditto for its loops in Seattle and Redmond.

"I can't think of any building that's actually hooked up yet," says Ron Kessack, who manages Bellevue's right of way.

"People know there should be fiber here in Bellevue," he adds. "We get calls every day from people asking, 'Why can't I get a high-speed connection?' "

Why, indeed? At least three telecom companies have put fiber down Factoria Boulevard in Bellevue. But the Factoria Mall, which abuts the road, has been waiting more than a year for Qwest to even say when high-speed service might be available to tenants such as Target, Mervyns, Old Navy, Nordstrom Rack, Gottschalks and Safeway.

"We don't have a timeline at this point," says Craig Chang, the mall manager.

At nearby Sterling Plaza, an office complex, one dot-com waited a year for a fast fiber connection from Qwest. By the time it was available, the company was splitting off from its parent and being sold.

Building owners sometimes pose an obstacle by limiting the number of telecom companies they admit and charging access fees, which have prompted some telecom companies to pass them by. Owners also want to avoid tangles of cable clogging access chutes and tenants abandoning lines when they leave. And they're looking for telecom providers that won't go bankrupt.

"We just don't have room to let every company in," says John Miller, general manager for Unico's Metropolitan Tract.

Watching the bottom line

To be sure, most Seattle skyscrapers have some fiber access. And even some older buildings are getting wired.

Cobalt Group, which provides Web sites and software for car dealers, connected its red brick building at 2200 First Avenue South with fiber. But it wasn't easy. And it hasn't been lucrative for the provider.

Cobalt waited nearly a year for AT&T to install the line — at AT&T's expense. And the traffic on the lines, which are used to back up Cobalt's servers located elsewhere, is relatively light. "I would be surprised if they've made any money off of us yet," says Marty Ahern, Cobalt's information-technology director.

To avoid such situations, telecom companies have grown steely-eyed about where they place fiber. Electric Lightwave, with an extensive network in the West, now looks for customers whose use is great enough to pay back the cost of a connection in three years.

"There is tons of fiber," says Ed Doyne, director of customer development for Fisher Plaza, near the Space Needle. His complex is becoming a telecom hub along with the Westin Building. "The problem is it just doesn't go into the buildings that it passes."

Many expect the glut will eventually be absorbed, much as telegraph overcapacity disappeared in the 1860s, thanks to good old ingenuity. Microsoft's Windows XP and other new computer applications are prompting more people to transmit photos and music, requiring fast connections.

Driven by such innovations, "bandwidth demand is doubling every year, so eventually you'll pick up the slack in fiber," says Keith Grinstein at venture-capital firm Second Avenue Partners. Estimates range from three years to a decade, he says.

Innovative minds also are devising more-radical solutions to bridge the last mile. AccelNet, based in Woodinville, uses microwave antennas on Cougar Mountain in Issaquah and Seattle's Bank of America Tower to shoot the Internet to homes and businesses in the area.

Terabeam of Kirkland uses laser beams to reach buildings in Seattle, Denver and New York. Cobalt had considered using Terabeam instead of AT&T, but the light would have been blocked when the roof closed at Safeco Field.

By far the most down-and-dirty method belongs to CityNet Telecommunications of Silver Spring, Md. It uses small robots to pull fiber cable into buildings through sewers. It has already plumbed the depths of Albuquerque and is talking to about 10 other cities, including Seattle.

"It's helping business do business," says spokesman Lee Allentuck, without a trace of irony.

Alwyn Scott can be reached at 206-464-3329 and ascott@seattletimes.com.

THE DALLAS MORNING NEWS, October 14, 2000

The Dallas Morning News

October 14, 2000, Saturday THIRD EDITION

SECTION: NEWS; Pg. 37A

LENGTH: 521 words

HEADLINE: Plano creek cleaned after sewage spill;
Officials say incident poses no health risk

SOURCE: Plano Bureau ofThe Dallas Morning News

BYLINE: Wendy Hundley

DATELINE: PLANO

BODY:
PLANO - Plano workers spent Friday cleaning dead fish from Spring Creek after more than 4 million gallons of raw sewage seeped into the waterway in what has been called the city's worst environmental spill.

"In my 21 years, it's the worst," said Mike Rapplean, Plano's public works operations manager. "It's one of our deepest, darkest nightmares." Despite the size of the spill, officials said that it did not affect the city's water supply and that there was no risk to public health.

The incident started about 4 p.m. Thursday when a contractor accidentally drilled into a 33-inch, pressurized sewer line in the 500 block of Accent Drive, near the intersection of North Central Expressway and State Highway 190.

"They were putting in a fiber-optic duct system and got too close to the sewer main," Mr. Rapplean said.

City officials would not release the name of the contractor.

The spill lasted for approximately nine hours, sending an estimated 4.3 million gallons downstream from the intersection into Spring Creek and Rowlett Creek. The spill killed fish in a roughly half-mile path from Accent Drive to Renner Road.

About 20 workers from Plano and the North Texas Municipal Water District worked through the night to repair the damage. Plano officials reported the spill to officials in neighboring cities but said it was doubtful that those cities would be affected.

A lift station, which pumps sewage uphill, had to be shut down so the damaged pipeline could be repaired, Mr. Rapplean said. While the station was shut down, he said, sewage continued "boiling" out of a manhole near the creek for several hours.

Potable water was piped into the creeks to try to dilute the contamination.

He said fish died from lack of oxygen in the water but he couldn't estimate the size of the fish kill.

He said the cleanup operation was expected to be completed Friday.

The Texas Natural Resource Conservation Commission was taking water samples in four different locations around the site of the spill on Friday, said Steve Berry, Plano's environmental health manager.

While it was too soon to know the results of those tests, he said the spill did not contaminate Plano's water supply, which comes mostly from Lake Lavon.

"This is not impacting the drinking water," Mr. Berry said. City officials do not anticipate any other environmental damage to result from the spill, Mr. Rapplean said.

Mr. Rapplean could not estimate the cost of the repairs and cleanup.

Officials were still trying to determine whether the contractor was negligent or was given wrong information about the location of the sewer line.

"We haven't determined if the contractor is going to have to pay for it," Mr. Rapplean said.

A similar situation occurred recently in downtown Dallas. On Labor Day, a subcontractor was drilling a horizontal hole for a fiber-optic **cable** line when a **water main** ruptured.

About 20 million gallons of water spilled out, flooding a garage and parts of two federal buildings and causing at least $ 300,000 in damage.

This story also appears in the Plano Morning News.

PLANO

GRAPHIC: PHOTO(S): (The Dallas Morning News: Richard Michael Pruitt) Jerry Allen, pre-treatment coordinator for the North Texas Municipal Water District, measures the oxygen in Spring Creek with an oxygen meter.

LOAD-DATE: October 15, 2000

THE DALLAS MORNING NEWS, February 25, 2001

The Dallas Morning News

February 25, 2001, Sunday THIRD EDITION

SECTION: PLANO MORNING NEWS; Pg. 1P

LENGTH: 1341 words

HEADLINE: Cable digs bring **flood** of problems;
Water-line ruptures increasing

SOURCE: Staff Writer

BYLINE: Wendy Hundley

DATELINE: PLANO

BODY:
Three customers had just gotten their hair lathered up with shampoo Wednesday afternoon at Nancy's Hair Salon in Plano when the water pressure turned to a trickle.

"All of the sudden we didn't have any water," said salon co-owner Phil Garcia. A company installing fiber-optic **cable** down the street had hit a water line, spilling thousands of gallons of water. The Plano Water Department turned the water back on for a couple of minutes, just enough time to rinse the bubbles from customers' hair.

"Fortunately we didn't have any colors or chemicals this afternoon," Mr. Garcia said a couple of hours after the mishap occurred at 18th Street and Avenue G. "We go with the flow, no pun intended." But local governments are finding it harder to go with the flow. Water line breaks are becoming increasingly common in Plano and other cities as companies rush to install miles of fiber-optic **cable** into an increasingly crowded underground infrastructure. Over the last two years, contractors installing underground fiber-optic **cables** have drilled into more than 60 water and sewer lines in Plano, spilling millions of gallons and causing more than $ 146,000 in damage.

In Plano, the problems really started a couple of years ago, said Robert Prunty, a Plano utility operations supervisor. "In my 20 years, we've always had lines getting hit occasionally. With all the construction going on in Plano, we might get hit once a month," he said. The pace has accelerated recently, sometimes with several breaks a month, he said.

While cities point the blame at careless excavating, companies say it's not always their fault.

"Burying things is not an exact science," said Bill Arnold, president of the Texas **Cable** and Telecommunications Association, which represents 48 **cable** television companies, including AT&T Broadband and Time Warner Inc. "Once you've buried something, there's nothing to keep the ground from shifting."

He said cities don't always know where their lines are or fail to provide correct information. "There's an awful lot of human error that goes on," Mr. Arnold said.

Mike Rapplean, Plano's public works operations manager, doesn't deny that the city can make mistakes. But he estimates Plano is only at fault 5 percent of the time.

"It's the subcontractors they hire that cause the problems," Mr. Rapplean said. "They don't follow the ordinance and request the line locates."

Some damage may be inevitable. "So many companies and agencies are wanting to get in our rights-of-ways," he said. "The problem is how much space is available."

Big losses

While inconvenient for residents and businesses, Wednesday's incident was minor, compared with the 20 million gallons of water that deluged downtown Dallas on Sept. 4 after a company installing fiber-optic **cable** hit a **water main.**

In Houston, workers laying fiber-optic **cable** in November dug into a 12-inch gas line and caused an explosion that was felt a mile away and blew a house off its foundation.

In Irving, city officials say a July 1999 hit on a 48-inch water line near Texas Stadium caused an estimated $ 500,000 to $ 1 million in damage.

Plano's worst environmental spill occurred Oct. 12 when a company installing fiber-optic **cable** bored into a 33-inch sewer main, spewing more than 4 million gallons of sewage.

Sometimes such incidents seem to go in spurts. The sewage spill was followed by a severed 10-inch sewer main Oct. 17 that caused $ 45,000 in damage and ripped out more than 200 feet of pipe. On Oct. 25, two water lines were struck, causing more than $ 5,000 in damage.

"That week, maybe 10 days, it was hectic," Mr. Rapplean said.

In most cases, Plano is reimbursed for the damage, but sometimes deciding who's to blame leads cities into litigation. Dallas and Irving are involved in lawsuits with companies regarding their big spills.

Always busy

Plano utility inspector Billy Clay blames 95 percent of the problems on excavators using poorly calibrated directional boring equipment. The efficient and time-saving machines can quickly bore 1,000-foot long underground trenches. But, when improperly set, the devices can easily stray from their route.

"I've seen one pop through the pavement three lanes away" from where workers were supposed to be boring, Mr. Clay said on Thursday, after inspecting the city's second water line hit in 24 hours.

As Plano's one-man inspection crew for fiber-optic **cable** work, his job is to make sure the companies comply with city regulations and restore landscaping, sidewalks and roads to their original condition.

"It takes a long time to get them to fix it," he said as he drove from one inspection job to the other while his cell phone rang incessantly. One call was about a resident threatening to lie down in front of excavating equipment. Another concerned a subcontractor who was refusing to dig a pothole to find a city utility line.

"Tell him if he doesn't pothole, he can leave. Because if he hits one of my lines, it's going to cost him to leave," Mr. Clay said.

"We can't stop them from coming into the town," he said. "But we're trying to get a handle on it."

Hard to handle

Getting a handle on it has become a major concern for city officials.

"No one ever dreamed there would be this influx of telecommunications companies, and there wasn't any strong management of rights-of-ways," said Cathy Lisenbee, a franchise utility inspector in Irving. "The big majority of cities didn't have inspectors that were familiar with the telecommunications industry and how it works."

The Texas Coalition of Cities for Utility Issues recently created an ad hoc committee to help cities draft or beef up their right-of-way management ordinances.

Dallas recently revised its regulations, and Trophy Club is creating its first ordinance after a **water main** leading into Trophy Club and Westlake was hit last year.

"There was water shooting 50 to 60 feet into the air," said Paul Rosenberger, assistant to the town manager.

Trophy Club's new ordinance, expected to be presented to the Town Council next month, incorporates some language from the Dallas ordinance.

"It governs not just fiber optics but any company digging in our right-of-way," Mr. Rosenberger said, noting that electric, gas and phone lines are also affected by the digging.

"It's inconvenient for residents [if a water line is hit]," he said. "But if they're hitting an electric line, it could be life-threatening."

Joint builds encouraged

In Irving, where officials have drafted a model ordinance that encourages "joint builds," in which several companies agree to lay their lines in a trench at the same time.

"At first they were a little hesitant because of proprietary information," Ms. Lisenbee said. "But now they like it because they share the costs."

Cities also like it because it causes less disruption and risk to their lines.

"Instead of five or six companies coming down the street at five or six different times, they dig one trench and significantly reduce the risk," Ms. Lisenbee said.

On March 14, the Plano City Council is scheduled to consider revising its 1987 ordinance.

"We've been working on this for more than a year," said Julie Fleischer, who handles the city's intergovernmental relations.

A key provision will be creation of zones near big sewer or water lines where directional boring will be prohibited.

To find the city's lines, "they'll have to excavate it by tractor or by hand," said Mr. Clay, who hopes the tougher regulations will help reduce damage to the underground infrastructure.

His colleague Mr. Prunty knows how crowded the narrow passageways have become and worries about how he'll maintain the water and sewer lines in the future.

"They're laying them [fiber-optic lines] right on top of our water and sewer lines all over this town," he said. "If I cut into one of them, they're going to hang me out to dry."

Source: All Sources > States Legal - U.S. > Texas > General News & Information > $ The Dallas Morning News
Terms: water main floods and cable (Edit Search)

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THE DALLAS MORNING NEWS, September 12, 2000

The Dallas Morning News

September 12, 2000, Tuesday THIRD EDITION

SECTION: NEWS; Pg. 1A

LENGTH: 1508 words

HEADLINE: Flood no surprise to experts;
Fiber-optic boom adds to risk of drilling damage

SOURCE: Staff Writers of The Dallas Morning News

BYLINE: Rick Klein, Michael Saul

BODY:
The Labor Day drilling accident in downtown Dallas was spectacular in its fallout, with a ruptured pipeline spilling 20 million gallons of water, flooding a garage and parts of two federal buildings and causing at least $ 300,000 in damage.

But to government officials and private contractors, the only things that made the accident exceptional were its location and the volume of water spilled. Many say that the **water-main** break typifies a growing nationwide problem brought on by the swift installation of fiber-optic **cables** in already crowded underground space.

"It is unavoidable. You can't put as much stuff in the ground as everybody does and not hit something," said Stacy Elms, safety director for Housley Communications Inc., a contracting service that has installed fiber-optic lines in the Dallas area for several telecommunications companies. City officials agree that accidents cannot be eliminated in underground drilling. Some propose stricter oversight and stronger regulations. But no measure can stop mistakes.

"I don't think you can prevent these kinds of things from happening," said Ramn Miguez, the Dallas assistant city manager who oversees Dallas Water Utilities. "We were very, very fortunate this time. ... They could have hit a gas line. We could have lost lives."

Hundreds of "dig-in" accidents - where underground infrastructure is damaged - occur in Texas every day, said Lee Marrs, president of Texas Excavation Safety System Inc., a nonprofit corporation that serves as a clearinghouse for information on the location and ownership of underground facilities.

The vast majority of those accidents cause little or no disruption: Telephone or electric service might go down for a few homes for a few minutes, he said. Had the downtown contractors struck a steam pipe or a phone line, or had they been working someplace more remote, few people would have even heard about the accident, Mr. Marrs said.

About 4:40 p.m. Sept. 4, Reata Construction Corp. workers drilling a horizontal tunnel under Young Street hit a city **water main** buried 30 feet down. The rupture loosed floodwaters down an abandoned railroad tunnel and into three downtown buildings.

More than 40 vehicles belonging to Santa Fe Terminal Loft residents were submerged. About 800 federal employees have yet to return to their offices because ruined cooling and power systems have rendered their building unusable.

Reata officials say city workers inadequately marked the pavement to show the location of the 52-year-old **water main.** Dallas officials, saying Reata was solely at fault, plan to bill the company for damages and cleanup costs. Reata, which was working as a subcontractor for Dynamic **Cable** Co., has not accepted responsibility, and the dispute may well be headed to court.

American cities have depended on underground conduits for more than a century, and each generation seems to have something new to put in the ground.

The latest underground boom is in the area of fiber optics - ultra-thin glass used to transmit voices and data at high speeds. Congress opened up the telecommunications industry in 1996, spurring the birth of hundreds of new companies that deploy fiber lines.

"Installation has grown exponentially," said Mike Paxton, an industry analyst for Cahners In-Stat Group of Scottsdale, Ariz. He said the last 18 months have seen the greatest spike in new fiber-optic lines.

Delicate work

Contractors say the traffic snarls that construction crews cause above ground are often matched by the congestion in underground arteries. Workers have to thread drills around gas, water, steam and sewer pipes; around electric lines, telephone lines and **cable** television lines; and around the fiber-optic **cables** freshly installed by other companies.

"People would be extremely, extremely shocked if they knew how many lines - even petroleum lines - are underneath the cities and suburbs," said Lance Gibson, vice president of Grand Prairie-based DOT Communications, which sells fiber-optic **cables** to contractors, including Reata.

"Downtown areas are absolutely the worst, and Dallas isn't half as bad as Boston, New York or Chicago."

In 1999, the city issued 7,354 permits for utility cuts; at least 249 of those were telecommunication permits. So far this year, the city has issued more than 6,000 permits for utility cuts; at least 155 of those were telecommunication permits.

On one February day this year, there were 1,046 active permits to cut into Dallas roads and alleys. And in April 1999, there were more than 1,000 water-utility cuts awaiting repair by street crews. (A concerted effort eliminated the backlog by July 1999.)

Decades of new service installation have left underground pipes and wires strewn like tangles of spaghetti. To make matters worse, some of those pipes predate reliable record keeping. Mr. Gibson said perhaps 5 percent of underground pipes don't show up on anybody's maps.

But even knowing about everything that is in the ground wouldn't eliminate risk. Up-to-date records aren't always precise. Drilling equipment and sensors can malfunction. Surface markings that are supposed to indicate the location of buried wires and pipes might be off.

Plenty of room exists for human error at every step along the way, said Mr. Marrs with Texas Excavation Safety System Inc.

"There are so many variables in it," he said. "It's more of an art than a science."

Oversight issues

In Dallas, most underground drilling occurs without direct oversight from the city. Municipal workers generally review plans before issuing permits for digging. But city representatives rarely supervise private digs in person, Mr. Miguez said.

"We could put a 1,000 people on it, it is still not going to prevent it from happening," he said.

Rickie James, a construction superintendent in the city's street services department, said the city should consider sending inspectors to major sites.

"If there is a large **water main,** like the one downtown, they might want to have someone there," said Mr. James, a city employee for 30 years.

Permit applications must be made 48 hours in advance of work. Officials say the applications are rarely denied. Under state law, companies or their contractors also must contact a "one-call center," which maintains databases on underground pipes and wires.

The one-call center contacts owners of buried lines in the vicinity, and those owners dispatch representatives to mark the pavement. That lets the drilling company know where lines and pipes are located. The city also usually marks off the location of underground city-owned pipes, such as water and sewer lines, before digging begins.

After the work is completed, contractors must restore the area to its original condition and are responsible for repairs stemming from their work for the life of the street. Violations are punishable by fines of up to $ 500 in most instances. Failure to clear debris from a street, alley, curb or sidewalk could result in fines of up to $ 2,000.

Later this month, the City Council is to discuss a proposal aimed at strengthening the ordinances governing utility cuts. The proposed rules would increase the notice period from 48 hours to 30 days. They would require contractors to start work within six months of permit approval. In most cases, the new rules also would impose a five-year moratorium on cutting into newly constructed or resurfaced streets. In addition, they would give the city the power to fix streets that were not repaired correctly and bill the responsible party for the cost.

Council member Veletta Forsythe Lill said she was concerned about contractors who cut up streets within weeks or months of resurfacing.

Timing a concern

"There needs to be better coordination of the timing of street cuts," she said. "And that responsibility rests with numerous parties - the city, the utility companies, the contractors."

State Rep. Steve Wolens, D-Dallas, said that ideally, cities would accommodate all companies that want to lay **cable** at the same time, so the same stretch of road wouldn't have to be torn up again and again. However, he cautioned, such regulations could limit competition by restricting the times when companies could install **cables.**

He said the city must strictly enforce its ordinances to make sure contractors aren't careless.

"I do accept that mistakes are going to happen, just like rear-end collisions happen on Central Expressway," Mr. Wolens said. "But that doesn't mean the rear-enders aren't responsible."

City staff and contractors agreed that last week's accident could have been far worse; no one was hurt or killed.

In that sense, Mr. Wolens said, the break may have been a welcome, if wet, wake-up call.

"It's the city's duty to protect the resources belonging to the taxpayers," he said. "This is a great

The Houston Chronicle November 03, 2000, Friday

November 03, 2000, Friday 3 STAR EDITION

SECTION: A; Pg. 35 MetFront

LENGTH: 587 words

HEADLINE: Gas **explosion** destroys home, forces evacuations

SOURCE: Staff

BYLINE: S.K. BARDWELL

BODY:
One home was blown off its foundation and another badly damaged by a natural gas **explosion** in northwest Harris County on Thursday morning.

The **explosion,** which caused an evacuation for about 12 hours, happened just before 9 a.m. in the 16500 block of Battlecreek near Millstone. Residents of the Copperfield subdivision said the blast could be felt at least a mile away. The home belonged to Assistant County Attorney Nick Turner.

No one was at home when the **explosion** and ensuing fire occurred. Neighbors said they believed the family dog escaped the blast, although they were unsure if the cat was as lucky.

Turner, who left his office and went to the scene, could not be reached for comment.

Several people were treated for minor cuts suffered in the blast, which blew debris one block in all directions and broke windows in houses on the street.

Authorities estimated the damage at $ 600,000.

Deborah Long, who lives about a mile away, said she and her husband ran outside when they felt the powerful **explosion.**

"We got in the car, and it was easy to find," Long said. "We just drove toward this plume of thick, black smoke that was going up."

Alicia Dixon, a spokeswoman for Reliant Energy, said a company doing work for Southwestern Bell was laying fiber-optic **cable** down the street from the Turner home when workers apparently dug into a 2-inch gas line.

Firefighters said the gas traveled down the line until it found a source of ignition at the Turner home.

Flames still burned from the home's foundation late in the afternoon as Reliant crews worked to cut off the gas flow feeding the fire. Dixon said that, in order to prevent further **explosions,** firefighters had to let the fire burn until the gas could be stopped.

The gas was cut off about 3:30 p.m., leaving about 30 customers without service, Dixon said. She said service is expected to return sometime today.

Many surrounding fire departments, including Houston's, sent engines to assist the Cy-Fair Volunteer Fire Department in controlling the fire and evacuating the area.

About 25 families were initially asked to leave the area after it was discovered that gas had entered sewer lines and other homes in the area.

Some of those leaving their homes, like Deborah Long, reported their toilets began gurgling and bubbling and that the smell of gas filled their homes.

"They didn't even have to come tell me," Long said. "I didn't want to be there. I took the dog and got out. I'm just glad I didn't light a cigarette. God knows I could have used one."

The evacuation area was expanded later to encompass about three-quarters of the densely populated subdivision, said Cy-Fair firefighter Raymond Holley.

Officials allowed most evacuees to return to their homes by 6 p.m., and those living adjacent to the **explosion** site were allowed to return beginning at 9 p.m.

Cornerstone United Methodist Church, at 15919 Ridge Park, opened its doors Thursday to all those who were unable to return home.

Donna Shrake, a spokeswoman for the Cypress-Fairbanks Independent School District, said no schools were affected by the **explosion.** As a precaution, she said, students were kept inside at Langham Creek High, Labay Middle and Copeland Elementary schools.

But Shrake said the situation became more complicated at the end of the school day, when 154 students who live in the evacuated area could not be taken home on their buses.

Shrake said school personnel stayed with the children at each campus until parents could come for them.

GRAPHIC: Map: Site of **explosion** that destroyed house on Battlecreek Drive in Harris County; Houston Chronicle

TYPE: -LINKS-

LOAD-DATE: November 4, 2000

ST. PAUL PIONEER PRESS
Saturday, December 12, 1998
Section: MAIN
Page: 1A

ST . CLOUD GAS MAIN EXPLOSION KILLS FOUR//15 INJURED AS BLAST LEVELS THREE DOWNTOWN BUILDINGS

Ruben Rosario, Mary Divine and John Welsh, Staff Writers

Shock and a sense of loss gripped ***St . Cloud*** after a natural gas explosion Friday killed at least four people and left a part of the downtown area looking like a war zone.

A day of death and destruction that rocked the state's third-largest metropolitan area will be replaced today by a search for answers.

A team of federal accident-reconstruction experts joined local and state officials late Friday to help piece together the events that led to the powerful midday blast.

The explosion apparently ripped through a vacant pizza parlor at 11:40 a.m., about 30 minutes after a construction crew ruptured a nearby gas line. There was no confirmation of reports that a drill bit might have ruptured the line.

The force of the blast toppled three buildings that housed Bellantti's Pizza and Deli, a bar, a law office and several apartments. The blast hurled debris and shards of glass for blocks, shook nearby buildings and prompted a six-block evacuation of hundreds of office workers, area residents and a nearby high school.

``All of a sudden, it was like a bomb going off - boom - and everything went black,'' said attorney Mike Burns, who was eating lunch and playing cribbage at Howie's, a bar across the street from the blast site. ``Stuff started falling on our heads, and we looked out, and all those buildings were gone.''

Two of the dead were identified late Friday as Bob Jacobs, 46, and Karl Klang, 53, both members of a Northern States Power Co. crew that had been dispatched to investigate the gas-line rupture.

Jacobs, of ***St . Cloud*** , was a 15-year veteran who worked as a highly trained gas trouble-shooter. He is survived by his wife, a 19-year-old daughter and a 16-year-old son. Klang, of Cold Spring, was a gas-line locater with a wife and two grown daughters.

A third victim of the blast, an unidentified woman, was found in a Taco John's parking lot across the street from the blast. People tried to ascertain whether she was a U.S. Postal Service worker who left for lunch about the time of the explosion. She was the only one of 150 workers at the downtown postal facility not accounted for, said Postmaster Buzz Snyder. Authorities were not able to confirm her fate late Friday night.

The body of a fourth victim, believed to be a tenant in one of the buildings leveled by the blast, was discovered about 3:30 p.m. by firefighters and other emergency personnel conducting a search of the rubble.

Four people - three women and a man - also were rescued from the law office toppled by the blast.

One of those rescued from the law office, a 23-year-old woman, was in critical condition with abdominal and skeletal injuries and remained hospitalized overnight at ***St . Cloud*** Hospital.

Fourteen others - including a ***St . Cloud*** firefighter who returned to help in the search for more victims - were treated for cuts and bruises and released.

A daylong search of the rubble was called off Friday night after authorities were satisfied no other victims were trapped, said ***St . Cloud*** Fire Chief Mike Holman. Three tenants who lived in the demolished buildings were placed in area hotels. Much of the electricity and gas service that had been cut off in the downtown area during the evacuation was expected to be fully restored overnight.

St . Cloud Mayor Larry Meyer said a street excavation crew accidentally hit a gas line while installing fiber-optic cables near Bellantti's, 30 Ninth Ave. N.

Karen Young, an NSP spokeswoman, confirmed that Seren Innovations Inc., a 2-year-old cable TV subsidiary of the Minneapolis-based utility, had subcontracted the excavation work and that a crew was laying cable in the area at the time of the explosion.

Mike McGrath of the Minnesota Office of Pipeline Safety said the subcontractor, Cable Constructors Inc. of Iron Mountain, Mich., had reported its excavation plans to Gopher State One Call, a Mendota Heights-based service that identifies underground utilities.

State law requires anyone excavating to call the service, which in turn contacts utilities in the area of the dig. The utilities send locaters to the sites before any digging begins. The locaters mark each underground utility with a different color.

Cable Constructors president John Jamar issued a statement expressing the firm's sympathy to the victims and their families. The statement also said the firm had little information Friday on the cause of the explosion or the involvement of its employees.

Seren Innovations is building an underground cable system throughout ***St . Cloud*** to offer cable television, Internet and other communication services. The company acknowledged it has a construction crew in the area, and pledged to cooperate with the investigation.

Meyer and others said it appeared that while the rupture took place on the street, the blast occurred about 20 to 30 minutes later inside the vacant pizza parlor, which was scheduled for a reopening sometime in January.

NSP said the initial call about the rupture came in at 11:13 a.m. Holman said fire crews were notified six minutes earlier. Jacobs and Klang were dispatched from the utility's service center in ***St . Cloud*** . The men arrived within five minutes and were assisting in the evacuation when the explosion took place about 22 minutes later.

Jim Hoard, NSP's chief executive officer, called the two men heroes.

``There were people who probably were able to get out of the way because of them,'' Howard told reporters at the scene.

The Denver Post

March 14, 1995 Tuesday 1ST EDITION

SECTION: A SECTION;

Pg. A-01

LENGTH: 815 words

HEADLINE: Gas leak blows up 2 homes, damages 10

BYLINE: Stacey Baca and Marilyn Robinson, Denver Post Staff Writers

BODY:

A Westminster woman escaped serious injury yesterday after a natural gas leak blew up her home and another nearby and then ignited a fire that damaged other houses in her suburban neighborhood.

Two houses exploded and burned to rubble after a construction crew nicked a gas line while installing wires for a cable television company.

The flames from those houses leaped to three additional homes, and broken windows or cracked walls were reported in seven more houses.

Authorities estimated the damage at $1.5 million.

When the explosion occurred shortly after 11 a.m., Judy Moore was inside her house at 3479 W. 112th Circle, just east of Front Range Community College. She had returned home from an aerobics class and had taken off her gym shoes when her house blew up. Within seconds, a second home across the street exploded and began to burn.

Moore crawled to safety. She later called her husband to tell him the news. "She was crying. She just said, 'I was in the house and it blew up,'" recalled Arlan Moore.

Judy Moore and other residents who live in a one-block radius were evacuated from the neighborhood and taken to a recreation center, where they waited for relatives and made phone calls. Moore was later taken to St. Anthony Hospital North and treated for minor injuries.

"She is in good spirits," Arlan Moore said as he sat in a hospital waiting room. "She really has a lot better instincts than I would have had."

Arlan Moore said his wife was getting ready to take a shower in the master bathroom on the second floor when the explosion erupted. She was able to crawl to safety before the house exploded into flames.

The couple moved into their brand-new home about six months ago, and Judy Moore recently finished decorating the entire house. But the only belongings the couple owned yesterday afternoon were the clothes on their backs and a car.

"This is it for me - my clothes," said Arlan Moore, pointing to his sweater and pants. "I have my gym bag in the car to work out, but that is it."

Arlan Moore made arrangements with an insurance agent while waiting for his wife to be released from the hospital. Judy Moore, decked in her workout clothes and white socks, was too upset to talk about her experience.

The Moores' across-the-street neighbors, who live at 3480 W. 112th Circle, were not home when their house exploded into flames, authorities said.

An entire chunk of wall from one home was blown into the middle of the street. A floral couch cushion and wicker basket seemed to be the only household items that were not burned beyond recognition.

A car that was parked inside the Moores' blackened garage was turned into a charred, metal skeleton. The home was reduced to ashes.

Authorities said the blast blew out out a window in a neighbor's home, cutting a 2-year-old boy and knocking a 3-week-old girl in a baby carrier off a counter top. Both children were treated at a clinic for minor injuries.

The homes went up in flames shortly after 11 a.m., but the problems with the gas line started about 9:45 a.m., when workers for Developers Cable Construction punctured a pipeline at 112th Circle and King Street, according to Dave Leiker, a spokesman for the Westminster Fire Department.

The crews were drilling a tunnel for the cable wires about 4 feet underground. They realized they struck the line and stopped drilling, said Leiker.

Residents said they immediately smelled gas. Mark Samaripa, who lives one block from the explosion, went to talk to the construction crew after his home filled with the gas odor.

"It smelled like I had sprayed with toxins," said Samaripa, who was home with his 6-year-old son. "I talked to the construction workers before the explosion happened. I told them something was wrong."

After the explosions, Samaripa ran inside at least two homes to warn residents of the danger.

The homes that exploded had filled with natural gas and then erupted into flames. Authorities were not sure what ignited the fires.

"Ignition could be anything, such as a pilot light from a furnace or possibly a spark from a light switch or outlet," Leiker said.

It is unclear who notified the Public Service Co.

But company spokesman Mark Stutz said gas crews arrived about 10:15 a.m. - at least 45 minutes before the explosion.

The workers had shut off the electricity and gas in the area and were trying to figure out where the construction crews ruptured the line.

The Public Service crew, Stutz said, was working near the homes when they exploded but also escaped injury.

As for Moore, Leiker said she was extremely lucky.

"She was probably in the right place at the right time. The explosion probably blew out the first floor and then dropped the second floor," Leiker said. "I don't think she would have fared as well if she had been on the first floor. I think the house would have come down on her."

GRAPHIC: PHOTOS: The Denver Post/Karl Gehring RESCUED: Westminster Police Officer Tim Wright carries pet rabbit rescued from 3469 W. 112th Circle. RUBBLE: A Westminster firefighter trains a hose on what's left of 3480 W. 112th Circle, one of the two homes leveled. A crew installing cable-television lines apparently damaged an underground gas line. RUINS: A firefighter moves past 3479 W. 112th Circle. PHOTO: The Denver Post/Shaun Stanley AFTER THE BLAST: Westminster firefighters pour water onto the ruins of homes destroyed by a natural-gas explosion and fires yesterday. A construction crew installing cable-television lines apparently damaged an underground gas line. The Denver Post Location of explosion (map)

LOAD-DATE: March 22, 1995

Exhibit 8 – Letter from General Counsel Jane Mago to Kenneth Fellman

Federal Communications Commission
Washington, D.C. 20554

October 18, 2001

Kenneth S. Fellman, Esq.
Kissinger & Fellman, P.C.
3773 Cherry Creek N. Drive, Suite 900
Denver, Colorado 80209

Re: FCC *Amicus* Brief in *TCG New York, Inc., et al. v. City of White Plains*

Dear Ken:

Thank you for your letter expressing LSGAC's concerns about footnote 7 in the Commission's amicus brief in the *White Plains* case. The Commission was involved in the *City of White Plains* case as an amicus to express the agency's position that costs imposed on new entrants, but not incumbents are not "competitively neutral and nondiscriminatory" under Section 253(c) of the Communications Act, 47 U.S.C. §253(c). Because the validity of gross revenues based-fees was an issue discussed extensively in the main party briefs, we felt a need to acknowledge the issue and did so in footnote 7. As we have discussed, however, the footnote was not intended to represent a definitive FCC position that Section 253 precludes any compensation above cost recovery. Indeed, we recognized that this is an issue that continues to develop in the courts and before the Commission, and we deliberately limited our discussion of the issue in the amicus brief.

We share your concern that others are misrepresenting the language of the brief. It is regrettable that some people are misusing it in the way described in your letter. This is not the first time that has happened with a brief filed by the Commission. In our experience, we believe that the best approach to dealing with this problem is to allow the brief to remain filed with the court as written. The brief says what it says, and the Commission filed the brief with some care to avoid taking a firm position on revenue-based fees. If and when parties review the brief, they will see that is the case. Indeed, if the Commission were now to withdraw the brief or the portion including footnote 7, we believe that action could similarly be misconstrued. Therefore, we are not inclined to take any action with respect to your request.

Thanks again for keeping us informed of developments related to this issue, and please let us know if there are further developments.

Very truly yours,

Jane E. Mago
General Counsel

Exhibit 9 – Letter from Rep. Stupak to Chairman Michael Powell

BART STUPAK
1st District, Michigan

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Washington, DC 20515
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Congress of the United States

House of Representatives

Washington, DC 20515–2201

COMMITTEE:
ENERGY AND COMMERCE
SUBCOMMITTEE:
HEALTH
TELECOMMUNICATIONS AND THE INTERNET
OVERSIGHT AND INVESTIGATIONS
CO-CHAIRMAN,
CONGRESSIONAL LAW ENFORCEMENT CAUCUS
DEPUTY WHIP

October 8, 2002

CHAIRMAN MICHAEL K. POWELL
FEDERAL COMMUNICATIONS COMMISSION
445 12 STREET, S.W.
WASHINGTON D.C. 20554

Dear Chairman Powell:

I understand that you will be holding a public forum on rights-of-way issues on October 16. I am writing to express my strong opposition to any rule-making that the Federal Communications Commission may be contemplating on this issue. This forum must not lead to an effort to weaken the current authority of states or municipalities to manage the public rights-of-way and require compensation for their use.

I have been very active on this issue for some time, and during the debate on the 1996 Telecommunications Act, I offered an amendment to preserve the authority of local governments to control behavior in the public rights-of-way and to receive fair compensation for use of public property by commercial enterprises. Without the amendment, the bill would have raised serious concerns regarding unfunded mandates, federal intrusion into local authority, and unfair taxpayer burdens. My amendment passed the House, and provisions on this issue were ultimately included in the final Act.

Congress has definitively stated its intent that states and municipalities should have authority over these issues, and I do not believe that further federal regulation is warranted.

I thank you for your consideration of this matter, and ask that you keep me informed of any actions that the FCC intends to take regarding rights-of-way authority.

Sincerely,

BART STUPAK
Member of Congress

BTS/dp

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